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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 495

FEDERAL COMMUNICATIONS COMMISSION  
PETITIONER

VS.

WJB, THE GOODWILL STATION, INC., AND COASTAL  
PLAINS BROADCASTING CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR CERTIORARI FILED JANUARY 4, 1949  
CERTIORARI GRANTED FEBRUARY 28, 1949

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1 In the United States Court of Appeals District of  
Columbia

No. 9464

WJR, THE GOODWILL STATION, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Appeal from the Federal Communications Commission

*Joint appendix*

In the United States Court of Appeals District of Columbia

[Title omitted.]

*Notice of appeal from decisions of the Federal Communications  
Commission and statement of reasons therefor*

Filed Jan. 7, 1947

I

NOTICE OF APPEAL

Now comes WJR, The Goodwill Station, Inc., and says that  
it is aggrieved and that its interests are adversely affected  
2 by the decision of the Federal Communications Commis-  
sion dated August 22, 1946 (reaffirmed by decisions dated  
October 14, 1946, and December 17, 1946, which last decision was  
publicly announced at the offices of the Commission on December  
18, 1946, denying appellant's Petition for Rehearing, entitled Peti-  
tion for Reconsideration and Hearing) granting without hearing  
an application for a radio station construction permit and modi-  
fied construction permit to Tarboro Broadcasting Co., Inc.

Wherefore, appellant gives notice of its appeal therefrom to  
the United States Court of Appeals for the District of Columbia.

II

STATEMENT OF THE NATURE OF THE PROCEEDINGS

1. Appellant is a corporation organized under the laws of the  
State of Michigan with its principal office at 2100 Fisher Building,  
Detroit, Michigan. Appellant is the licensee of radio station  
WJR, located at Detroit, Michigan, and has been such licensee for  
18 years. This station is authorized by the Federal Communica-



tions Commission to operate on 760 kc. with power of 50 kw., unlimited time, and has operated on this assignment (including its prior assignment on 750 kc.) for over 11 years. The rules of the Commission (Sections 3.22 and 3.25) classify WJR as a Class I clear channel station and provide a maximum and minimum power limitation of 50 kw.

2. The Tarboro Broadcasting Company, Inc., filed on May 28, 1946, an application for construction permit seeking authority to construct and operate a new standard broadcast station at Tarboro, North Carolina, on 760 kc. (the same frequency used by appellant) with power of 1 kw., daytime hours only (File No. B3-P-4891). On August 22, 1946, the Commission issued Report No. 877 announcing the granting of the application of Tarboro Broadcasting Co., Inc., subject to the condition that the applicant file within 60 days an application for modification of construction permit specifying a transmitter site and antenna system meeting the requirements of the Commission. This action was taken by the Commission without hearing and without prior notice of its intended action to appellant.

3. On September 10, 1946, and within the twenty-day period prescribed by Section 405 of the Communications Act of 1934, as amended, appellant filed with the Commission a Petition for Rehearing (entitled Petition for Reconsideration and Hearing). In this petition appellant requested that the Commission reconsider its action of August 22, 1946, granting without hearing the application of Tarboro Broadcasting Company, Inc.; that the application be designated for hearing; and that appellant be made a party to the hearing. In the alternative, it was requested that the Commission's action on the Tarboro application be withheld pending decision in Docket 6741 entitled "In the Matter of Clear Channel Broadcasting in the Standard Broadcast Band." The petition was accompanied by an affidavit of a qualified radio engineer and alleged, among other things, that the operation of the proposed Tarboro station would cause objectionable interference within the present interference-free service area of appellant's station; that interference would result to the WJR daytime signal in all counties in upper Michigan and in all or parts of twelve counties in lower Michigan, which area falls within the so-called "cutover" region studied by the Commission in its "FCC Radio Survey, July 1945" introduced as an exhibit in the above-mentioned Clear Channel proceeding; that this exhibit showed that appellant's station is the most listened to station, both day and night, in the so-called "cutover" region; and that a substantial number of listeners depending upon WJR for service in this area would be deprived of such service by the granting of the Tarboro application. Moreover, the affidavit attached to the peti-

tion alleged that interference to WJR's service will occur in the States of Indiana, Ohio, Pennsylvania, and New York.

4. Appellant's Petition for Reconstruction and Hearing also alleged that the Commission erred in granting the Tarboro application while the Clear Channel proceeding (Docket 6741) was pending and undecided; that the Clear Channel proceeding is being held to determine, among other items, whether WJR, a Class I clear channel station, should be permitted to operate with power in excess of 50 kw. and whether the present service in the areas of WJR should be increased or decreased (Issues 3, 4, and 5 in Docket 6741); and that because of the effect of the Tarboro station's operations upon WJR, the granting of the Tarboro application renders difficult, if not impossible, the proper determination of the issues in the Clear Channel proceeding.

5. Appellant desires to operate its station WJR with power of 500 kw. or more but is prohibited from doing so by Section 3.22 of the Commission's rules. On June 13, 1936, appellant filed with the Commission its application to operate with 500 kw. (File No. B2-P-1199), but the application was dismissed without prejudice on June 16, 1942, pursuant to the Commission's wartime policy against the granting of applications requiring the use of additional materials. The Commission will not permit appellant to refile its application for permission to operate with power in excess of 50 kw. By Public Notice No. 89273, dated February 5, 1946, the Commission announced its policy to the effect that applications requesting power in excess of 50 kw. could not be filed until the conclusion of the Clear Channel proceeding and the subsequent modification, if any, of the Commission's rules and regulations. The Clear Channel proceeding was initiated by the Commission's order of February 20, 1945. Several issues relate to the permissive power and service area of clear channel stations; including Nos. 3, 4, 5, and 8. The Notice of Hearing provides that a hearing shall be held to determine:

\* \* \* \* \*

5 "3. What minimum power and what maximum power should be required or authorized for operation on clear channels.

"4. Whether and to what extent the authorization for clear channel stations in excess of 50,000 watts would unfavorably affect the economic ability of other stations to operate in the public interest.

"5. Whether the present geographical distribution of clear channel stations and the areas they serve represent an optimum distribution of radio service or whether the fair, efficient and equitable distribution of radio service among the several states and



communities specified in Section 307 (b) of the Communications Act require a geographical redistribution at this time.

\* \* \* \* \*

"8. What changes the Commission should order with respect to geographical location, frequency, authorized power or hours of operation of any presently licensed clear channel stations."

These issues remain undecided, as the record in the Clear Channel proceeding is still open, additional hearings will be held, and no decision has been announced by the Commission.

6. On August 27, 1946, Tarboro filed its application for modification of construction permit, which application specified a transmitter site and antenna system (File No. B3-MP-2115), and on September 9, 1946, filed an amendment to its application to change the applicant's name to Coastal Plains Broadcasting Company, Inc. On October 14, 1946, this amended application for modification of construction permit was granted, and on November 25, 1946, the modified construction permit was mailed to the applicant.

7. On October 18, 1946, Tarboro Broadcasting Company, Inc., filed an opposition to appellant's Petition for Reconsideration and Hearing, and on December 17, 1946, the Commission adopted a decision and order denying appellant's petition, public announcement of which was made at the offices of the Commission in Washington, D. C., on December 18, 1946 (Report No. 941).

### III

#### STATEMENT OF REASONS FOR APPEAL 3

1. The Commission's decision of August 22, 1946 (reaffirmed October 14, 1946, and December 17, 1946) is contrary to law for each of the following reasons:

a. It results in a substantial modification of appellant's license to operate radio station WJR without notice in writing to appellant or affording appellant an opportunity to be heard as required by Sections 303 (f) and 312 (b) of the Communication Act of 1934.

b. It results in real, destructive and ruinous interference to a very substantial portion of the service area of WJR where WJR's signal is interference-free without giving appellant notice in writing or affording appellant an opportunity to be heard, in violation of Section 312 (b) of the Communications Act of 1934.

c. It deprives a large and substantial number of listeners, presently depending upon WJR for broadcast service, of a listenable signal from WJR in violation of Section 307 (b) of the Communications Act of 1934.

d. It results in a predetermination of the issues in the Clear Channel proceeding in that it makes it much more difficult, if not impossible, for WJR to obtain authorization to operate with power of 500 kw. or more, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

e. The Commission was without power to grant the Tarboro applications except after a hearing upon issues clearly defined and after affording appellant an opportunity to participate fully in such hearing.

f. The Commission was without power to deny appellant's Petition for Reconsideration and Hearing and finally to grant the Tarboro applications except after full hearing in which appellant was permitted to appear and participate fully therein.

2. The decision complained of (reaffirmed October 14, 1946, and December 17, 1946) is erroneous, arbitrary, and capricious and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States in that it was made without affording appellant notice and an opportunity to be heard.

3. The decision complained of (reaffirmed October 14, 1946, and December 17, 1946) is erroneous, arbitrary, and capricious in that it adversely affects and prejudices, by reason of electrical interference, the appellant's right to operate its station WJR with power of 500 kw. or more, a right presently being litigated in the Clear Channel hearing (Docket 6741), the record in which is still open for the purpose of receiving additional evidence.

4. The Commission's decision (reaffirmed October 14, 1946, and December 17, 1946) is erroneous, arbitrary, and capricious in that the operation proposed by the Tarboro application is not in the public interest, convenience and necessity, as it results in substantial and destructive interference over a wide area to the interference-free service of appellant's station WJR and deprives a large and substantial number of listeners relying upon WJR's service of such service.

5. The Commission erred in failing to grant the relief requested by appellant in its Petition for Reconsideration and Hearing, filed September 10, 1946.

6. The Commission erred in granting the Tarboro applications for construction permit and for modification of construction permit, and in denying appellant's Petition for Reconsideration and Hearing.

7. The decision complained of (reaffirmed October 14, 1946, and December 17, 1946) is illegal, void, and in violation of the due process clause of the Fifth Amendment to the Constitution of the



6 FCC VS. WJR, THE GOODWILL STATION, INC., ET AL.

United States in that appellant was denied a hearing before the Commission.

8 8. The appellant is aggrieved and adversely affected, and also the public interest in receiving efficient radio service is adversely affected, by the decisions complained of in that the service of station WJR will be greatly curtailed over a large area, including that area where substantial numbers of listeners depend upon WJR for broadcast service, and also in that appellant's ability to expand its service to listeners by operating with power of 500 kw. or more will be seriously prejudiced by reason of electrical interference from the Tarboro operation.

IV

RELIEF REQUESTED

Wherefore, the appellant prays an order reversing said decisions of the Federal Communications Commission and for such further relief as this court may deem just and proper.

Respectfully submitted.

WJR, THE GOODWILL STATION, INC.  
By (S) Louis G. Caldwell,  
LOUIS G. CALDWELL,  
(S) Reed T. Rollo,  
REED T. ROLLO,  
(S) Percy H. Russell, Jr.,  
PERCY H. RUSSELL, Jr.,

*Its Attorneys.*

914 National Press Building, Washington 4, D. C.  
JANUARY 7, 1947.

\* \* \* \* \*

9 Federal Communications Commission

Docket No. 6741

IN THE MATTER OF CLEAR CHANNEL BROADCASTING IN THE STANDARD BROADCAST BAND

*Order re issues*

Whereas, this Commission and its predecessor, the Federal Radio Commission, have since November 11, 1928 designated certain channels in the standard broadcast band as "clear channels" the purpose of which is to render service over large areas and to bring service to the rural population of the United States; and

Whereas, there are still large areas of the continental United States which have no radio service during the day and no primary radio service at night; and

Whereas, the Commission has received many applications requesting authorization for the operation of additional stations and for the use of higher power on the clear channel frequencies; and

Whereas, these applications raise issues which can more appropriately be considered in a general hearing than in a hearing limited to particular applications; and

Whereas, the North American Regional Broadcasting Agreement expires March 29, 1946, and it is desirable to determine what, if any, changes are necessary in connection with clear channel assignments prior to a renegotiation of the treaty;

Now, therefore, it is ordered, this 20th day of February 1945, that a hearing be held before the Commissioner en banc commencing at 10:30 A. M. on May 9, 1945, at the offices of the Commission in Washington, D. C., for the purpose of determining:

1. What recommendation concerning the matters covered by this order the Commission should make to the Department of State for changes in provisions of the North American Regional Broadcasting Agreement.

2. Whether the number of clear channels should be increased or decreased and what frequencies in the standard broadcast band shall be designated as 1-A channels and as 1-B channels.

3. What minimum power and what maximum power should be required or authorized for operation on clear channels.

4. Whether and to what extent the authorization of power for clear channel stations in excess of 50,000 watts would unfavorably affect the economic ability of other stations to operate in the public interest.

5. Whether the present geographical distribution of clear channel stations and the areas they serve represent an optimum distribution of radio service or whether the fair, efficient, and equitable distribution of radio service among the several states and communities specified in Section 307 (b) of the Communications Act requires a geographical redistribution at this time.

6. Whether it is economically feasible to relocate clear channel stations so as to serve those areas which do not presently receive service.

7. What new rules or regulations, if any, should be promulgated to govern the power or hours of operation of Class II stations operating on clear channels.

8. What changes the Commission should order with respect to geographical location, frequency, authorized power or hours of operation of any presently licensed clear channel station.



9. Whether and to what extent the clear channel stations render a program service particularly suited to the needs of listeners in rural areas.

10. The extent to which the service areas of clear channel stations overlap and the extent to which this involves a duplication of program service.

11. What recommendation, if any, the Commission should make to the Congress for the enactment of additional legislation on the matters covered by this order.

It Is Further Ordered, that persons or organizations desiring to appear and testify shall notify the Commission of such intention on or before April 2, 1945, stating the names of all witnesses who will appear, the topic each will discuss, and the time expected to be required for the testimony.

FEDERAL COMMUNICATIONS COMMISSION.  
T. J. SLOWIE, *Secretary*.

Before Federal Communications Commission

*Appearance of Clear Channel Broadcasting Service and its members*

April 2, 1945—

Responding to the Commission's order in the above-entitled cause, the Clear Channel Broadcasting Service and its members, comprising the following licensees of clear-channel stations:

**Licensee and Call Letters**

Earle C. Anthony, Inc., KFI.

A. H. Belo Corporation, WFAA.

National Life & Accident Insurance Co., WSM.

Courier Journal & Louisville Times, WHAS.

Stromberg-Carlson Telephone Manufacturing Co., WHAM.

WJR The Goodwill Station, WJR.

Southland Industries, Inc., WOAI.

Carter Publications, Inc., WBAP.

WCAU Broadcasting Co., WCAU.

Loyola University, WWL.

Central Broadcasting Co., WHO.

Atlanta Journal Co., WSB.

WGN, Inc., WGN.

Crosley Corporation, WLW.

Agricultural Broadcasting Co., WLS.

Westinghouse Radio Stations, Inc., KDKA.

hereby notify the Commission of their desire to appear and testify at the hearing to be held herein. This appearance is filed

in behalf of the foregoing parties both collectively as a group and individually so as to reserve to each licensee full liberty to make such separate or supplementary presentation and to take any and all other steps in the course of the proceedings in its own name and behalf as it may deem necessary or desirable.

Notwithstanding the utmost diligence on the part of the above-named parties, they are unable at this time to state the names of the witnesses who will appear in their behalf, the topics each witness will discuss, or the time expected to be required for the testimony. This is because the work that has so far been accomplished in preparation on the issues is not sufficiently advanced.

Respectfully advanced.

LOUIS G. CALDWELL,

*Counsel for the above-named parties.*

\* \* \* \* \*

*Public Notice 89273*

FEDERAL COMMUNICATIONS COMMISSION.

WASHINGTON 25, D. C., *February 5, 1946.*

On February 1, 1946, the Federal Communications Commission adopted four orders dismissing without prejudice a number of applications which involved direct conflicts with Commission Rules. - The orders however, provide procedures for reinstatement of the dismissed applications at the conclusion of general legislative proceedings now pending before the Commission. In the event the Commission's rules are subsequently modified, suitable notice will be afforded all interested persons and a period will be provided in which to file competing applications. In the interest of orderly administration it is desired to emphasize that pending applications inconsistent with the Commission's Rules do not afford parties any equities or priorities on the frequency.

The applications thus dismissed are divided into four categories: (1) Those involving conflict with Section 3.25 (a) in that they request duplicate nighttime operation on channels reserved for the exclusive nighttime use of one station only; (2) Applications involving conflict with Section 3.25 (d) since nighttime operation is requested on a channel available for daytime operation only, in the United States; (3) Applications involving conflict with Section 3.22 which propose operation with a power in excess of 50 kw., the maximum permitted by Commission Rules; and (4) Applications requesting the use of frequencies for standard broadcast stations which are not presently included in the frequencies allocated for that service.



All interested parties affected by these orders have been or will be afforded opportunity to present evidence for consideration in connection with the Clear Channel and General Allocation Hearings. However, parties will not be permitted to offer evidence in those hearings on the merits of particular applications.

With respect to applications proposing operation in accordance with present rules on the frequencies listed under Section 3.25 (a) (i. e. those requesting limited time or daytime only assignments), the Commission has been concerned with the possibility that a grant of a large number of such applications would further complicate the problems that are involved in the Clear Channel Hear-

ing. Further study of this matter has resulted in the conclusion that in many instances placing additional daytime only stations on the U. S. 1-A channels may not unduly

complicate the problems, and accordingly all such applications will be considered individually on their merits. When no conflict with a resolution of the general problems that are at issue in the Clear Channel hearing can be foreseen, additional daytime assignments on U. S. 1-A channels may be made before conclusion of the hearing. It is, however, possible to foresee that severe complications may arise by authorizing the operation of additional limited time stations, and such applications will be given careful consideration with a view to determining the possible complications, and in the event they can be foreseen, the applications may be conditionally granted for daytime operation only.

*Public Notice 95034*

FEDERAL COMMUNICATIONS COMMISSION.

WASHINGTON 25, D. C., June 21, 1946.

The Federal Communications Commission in its Public Notice, dated February 5, 1946, stated that with respect to applications proposing operation daytime only or limited time on the frequencies listed under Section 3.25 (a) of its Rules, the Commission has been concerned with the possibility that a grant of a large number of such applications would further complicate the problems that are involved in the Clear Channel Hearing, but that when no conflict with the resolution of the general problems that are in issue in the Clear Channel Hearing can be foreseen, additional daytime assignments on United States 1-A clear channels may be made before conclusion of that hearing.

Further consideration of the problems involved in making Class II station assignments on 1-A frequencies has resulted in a decision to adopt the following procedure: (1) The Commission will withhold action on all applications involving use of 1-A frequencies, daytime or limited time, where the proposed sta-

15 tion is more than 750 miles from the dominant 1-A station, using a nondirectional antenna on the frequency requested or is outside the 0.5 mv/m 50% skywave contour of the dominant class 1-A station using a directional antenna on the frequency requested. (2) The Commission will consider on their individual merits applications involving use of 1-A channels, daytime or limited time, where the proposed station is 750 miles or less from the dominant 1-A station using a nondirectional antenna on the frequency or is within the 0.5 mv/m 50% skywave contour of the dominant class 1-A station using a directional antenna on the frequency requested. Applications in this category will not at this time be granted limited time, but will be considered and may be conditionally granted for daytime operation only.

Applications filed with the Commission which come within the first category above will be placed in the Commission's pending file and held without further action until conclusion of the proceedings in the Clear Channel Hearing, (Docket No. 6741). After the conclusion of the Clear Channel Hearing, suitable notice will be afforded all interested persons and a period will be provided in which to file competing applications.

Applications in direct conflict with Section 3.25 or 3.22 of the Commission's Rules with respect to time of operation, power limitation or frequencies will, as set forth in the Commission's Public Notice of February 5, 1946, be dismissed without prejudice.

\* \* \* \* \*  
Southwest Iowa Broadcasting Co., Creston, Iowa, 750 kc., 1 kw., D. (B4-P-4683).

Arthur H. Groghan, Santa Monica, Calif., 750 kc., 1 kw., L-WSB, (B5-P-4236).

Donnelly C. Reeves, Hanford, Calif., 870 kc., 250 w., D. (B5-P-4423).

Radio Broadcasting Associates, Houston, Texas., 1180 kc., 250 w., D. (B3-P-4563).

Scenic City Broadcasting Co., Middleton, R. I., 1200 kc., 250 w., L-WOAI (B1-P- ).

16 C. Mervin Dobyns, San Bernardino, Calif., 1180 kc., 1 kw., D. (B5-P-4689).

Southern California Broadcasting Co., Monterey Park, Calif., 830 kc., 5 kw., D. (B5-P-3710; Dock. 6737).

Bay Cities Radio Corp., Santa Monica, Calif., 890 kc., 1 kw., D. (B5-P-4481).

Niagara Falls Gazette Publishing Co., Niagara Falls, N. Y., 1200 kc., 1 kw., L-WOAI (B1-P-3879).

Times Star Publishing Co., Alameda, Calif., 1210 kc., 1 kw., D. (B5-P-4418).

\* \* \* \* \*



File No. B2-S-331. Official No. 331. Call letters WJR

## Federal Communications Commission

*Radio broadcasting station license*

Modified in accordance with Order 107-A adopted July 10, 1945

Subject to the provisions of the Communications Act of 1934, subsequent acts and treaties, and all regulations heretofore hereafter made by this Commission, and further subject to conditions set forth in this license, the Licensee WJR, The Goodwill Station, Inc., is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning October 1, 1945, and ending November 1, 1946 (3 a. m., Eastern Standard Time).

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 760 kc.

2. With power of 50 kilowatts.

Antenna current 23.06 amperes for 50 kilowatts.

Antenna resistance 94 ohms.

3. During the following period or periods of time:

17 Unlimited time.

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

4. Under the call letters WJR.

5. With the main studio of the station located at 2800 Fisher Building, West Grand and Second Boulevards, Detroit, Michigan.

The apparatus hereinabove authorized to be used and operated is located at: Wyandotte, S. W. Corner Sibley and Grange Road, approximately 16 miles south of Detroit, Michigan. Lat.  $42^{\circ}10'07''$  North, Long.  $83^{\circ}13'00''$  West and is described as follows: Western Electric, Type 306-B, Broadcasting Transmitter, Serial No. 101. Direct Crystal Control, Last radio stage: six 8.5 kilowatt vacuum tubes for low level modulation. (Federal 342-A). Maximum rated carrier power output 50 kilowatts. Antenna: Single uniform cross-section tower; height of vertical lead, 700'; over-all height above ground, 710'. Ground system consists of 120 radials 600' long, buried 8". Tower painted and lighted in accordance with the attached specifications.

For emergency purposes only, when by reason of break-down or similar reason the said apparatus cannot be used, the licensee is authorized to use and operate (but only in accordance with the terms and conditions of this license) the auxiliary radio transmitting apparatus located at: Wyandotte, S. W. Corner Sibley and Grange Road, approximately 16 miles South of Detroit, Michigan, with power of: 10 kilowatts. Antenna current—10.31 amperes for 10 kilowatts; antenna resistance—94 ohms and described as follows: Western Electric, Type 105-C-Modified, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: four 21½-kilowatt vacuum tubes for low level modulation (Federal Telegraph 320-B). Maximum rated carrier power output 10 kilowatts.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the terms hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 17th day of September 1945. This license supersedes license dated September 17, 1945, effective 10-1-45.

By direction of the Federal Communications Commission,

[SEAL]

Secretary.

rek:

19

Date filed 5-28-46

File No. B3-P-4891. Call Letters New

Federal Communications Commission

*Application for new standard broadcast station construction permit*

(Submit application and all exhibits, in triplicate, to Federal Communications Commission, Washington, D. C. Swear to at



(least two copies. If space provided is insufficient attach inserts.)

Before executing application see Communications Act of 1934, as amended, Part 1 (Rules of Practice and Procedure), Part 2 (General Rules and Regulations), and Part 3 (Standard Broadcast Rules) of the Commission's Rules and Regulations and the Standards of Good Engineering Practice Concerning Standard Broadcast Stations. All technical terms, such as "normally protected contours" and "objectionable interference," are for convenient reference only and are to be construed as having the same meaning as when used in the Rules and Regulations and the Standards. The use of the terms "normally protected contours" and "objectionable interference" shall not be taken as implying any right to protection of such contours or from such interference.

To the Federal Communications Commission:

1. Name of applicant: Tarboro Broadcasting Company, Inc.
2. Post-office address: State North Carolina City Tarboro Street and number c/o Hanner Motor Company.
3. Notices and communications with respect to this application are to be addressed to the following-named person at the address indicated:

John C. Hanner, c/o Hanner Motor Company, Tarboro, N. C.

20 Frank U. Fletcher, Attorney, 737 Woodward Building, Washington 5, D. C.

Federal Communication Commission, Sept. 10, 1946,  
office of Secretary

Before the Federal Communications Commission

File No. B-3-P-4891

In re Application of Tarboro Broadcasting Co., Tarboro, North Carolina, For Construction Permit

*Petition for reconsideration and hearing*

WJR, The Goodwill Station, Inc., by its attorneys, hereby petitions the Commission to reconsider its action of August 22, 1946 whereby it granted without a hearing the above-entitled application and to designate such application for hearing making WJR a party thereto; or, in the alternative, to hold in abeyance any grant of such application pending a decision in the Clear Channel case, Docket 6741.

In support of its request, petitioner states:

1. Petitioner is the owner, operator, and licensee of Station WJR, which operates on 760 kc. a Clear Channel, Class Ia frequency, with 50 kilowatts power, unlimited time.

2. Tarboro Broadcasting Company, by the Commission's action, has been granted a permit to construct a new standard broadcast station at Tarboro, North Carolina, for operation on 760 kc. with power of 1 kilowatt, daytime only. As a result of such operation, the present interference-free service area of WJR will be subjected to objectionable interference. Details of such objectionable interference are set forth in an affidavit by George F. Leydorf, a qualified radio engineer, which is attached hereto as Exhibit A.

21 3. As shown by Exhibit A, interference will result to the WJR daytime signal in all counties in upper Michigan and twelve (12) counties in lower Michigan. This area falls within the so-called "Cut-over" region studied by the Commission in its "FCC Radio Survey, July 1945," which survey has been made a part of the record in the Clear Channel case. Particular reference is made to Vol. III, Part 1—Table 1-17 of that Survey (Exhibit 64) which shows that WJR is the most listened to station, both day and night, in the "Cut-over" region. The substantial number of listeners now depending upon WJR service in this area will be deprived of such service through the operation of the proposed Tarboro station.

4. Moreover, the Commission's action complicates the issues in the Clear Channel case, Docket 6741. The grant of the Tarboro application is not conditioned in any way upon whatever decision the Commission may make in the Clear Channel case. Thus, the grant may make it difficult, if not impossible, for the Commission to decide properly the issue of whether or not WJR, a dominant station operating on a clear channel, should be granted increased power (issues Nos. 3 and 4); whether or not the present service area of WJR should be diminished or increased (issue No. 5); and related issues. Any other conclusion of the effect of the Commission's action would have to be predicated upon the assumption that the Commission in the Tarboro case has already made a final determination of certain issues in the Clear Channel case. Such a determination of any one of the Clear Channel issues in an individual case as here, prior to proper and thorough consideration of the evidence and entire record in the Clear Channel case and prior to the issuance of proposed findings and conclusions by the Commission on all issues involved, would be improper.

Wherefore, the petitioner requests the Commission to reconsider its action of August 22, 1946 and to designate the Tarboro Broadcasting Company application for hearing or, in



the alternative, to hold in abeyance its grant of such application until after a decision in the Clear Channel case.

Respectfully submitted.

LOUIS G. CALDWELL,

REED T. ROLLO,

KELLEY E. GRIFFITH,

914 National Press Building, Washington 4, D. C.,

Its Attorneys.

EXHIBIT "A"

*Affidavit of George F. Leydorf*

George F. Leydorf, having been duly sworn on oath, deposes and says as follows:

The effect of daytime operation of a 1 KW Station on 760 KC/S located at Tarboro, North Carolina on the service now being rendered by WJR, Detroit, has been studied. In this study the measured field intensity of WJR was used and the field intensity of the Tarboro, North Carolina Station was obtained from the 10%, 10 A. M. to 2 P. M. curve from F. C. C. exhibit 7, Docket No. 5072-A. The inverse field of the Tarboro Station was assumed to be 175 MV/M at one mile. Interference was assumed to take place when the field intensity of this Tarboro Station exceeded 10% of the time was 5% or more of the average measured field intensity of WJR, which is in accord with present F. C. C. standards.

These calculations show that the service of WJR will be interfered with between the hours of 10 A. M. and 2 P. M. northwest and north of a line passing through the northern part of Lower Michigan. This line is located approximately as follows:

Starting near Luddington, Mason County, Michigan, the line runs northeast, passing three miles southeast of Manistee, Manistee County, thence about three miles southeast of Traverse City, Grand Traverse County, thence about two miles north of Gaylord, Otsego County, and, turning more easterly, reaches Lake Huron about five miles south of Presque Isle, Presque Isle County.

Interference will take place in all of upper Michigan and in counties, or approximate fractional parts of counties of Lower Michigan as follows:

County  
Mason  
Manistee  
Benzie

Fraction of  
county  
affected

NW 1/10

NW 1/4

NW 9/10

County	Fraction of county affected
Grand Traverse	NW 1/5
Leelanau	All
Antrim	NW 2/3
Charlevoix	All
Emmet	All
Otsego	North 1/3
Cheboygan	All
Montmorency	NW 1/10
Presque Isle	North 9/10

In the above-mentioned area the field intensity of WJR averages 32 microvolts per meter or less during daytime hours. However, over much of this region WJR provides the best signal available.

This area falls within the cut-over region studied in the F. C. C. Radio Survey, July 1945, collected and compiled by the Bureau of the Census for the F. C. C. and which is in evidence on Docket No. 6741 as Exhibit 74. The survey shows that in the cut-over region WJR is the most listened to station, both day and night (see Description of F. C. C. Radio Survey; and F. C. C. Radio Survey, July 1945, Vol. IXI, Part 1, Tables 15-8, 16-8, and 17-8).

The calculations also show that interference will be found in the States of Indiana, Ohio, Pennsylvania, and New York. However, in the bulk of the area affected, a better signal is provided by other stations.

During the hours between sunrise and 10 A. M.; and between 2 P. M. and sunset the skywave of the Tarboro Station will be stronger than the values used for the 10 A. M.-2 P. M. calculations. There will be some sky wave present in the WJR signal as well, but it will not be strong enough to increase the median value of the WJR field intensity proportionately. Therefore, during these hours, interference will exist closer to WJR than the boundary line described above.

The useability of the WJR signal in Northern Michigan is verified by the atmospheric noise data in evidence on Docket 6741 (Exhibit 264 fig. 12-3 and Exhibit 109 fig. 2-1). According to these data 40 microvolts per meter will give atmospheric noise free reception for 50% of the year, and therefore 30 microvolts per meter will give atmospheric free reception for 35% of the year. Since atmospheric noise is largely concentrated in the six summer months of the year, the service of WJR during the six winter months will be noise-free for a large percentage of the time.

On the other hand, daytime transmission data now being compiled indicated that the daytime skywave field intensity during the six winter months is substantially stronger than during the summer months.



The interference which would be caused by the proposed Tarboro Station would therefore be concentrated in the winter months during which the WJR service in Northern Michigan and similar remote areas is now most acceptable. The concentration of interference within the winter months not only substantially increases the number of hours lost at the 32 microvolt per meter contour, but also results in the loss of 10% of the hours at much higher contours during the winter season.

George F. Leydorf.

GEORGE F. LEYDORF.

*Chief Engineer.*

*WJR, The Goodwill Station, Inc.*

25 Sworn to and subscribed before me this 5th day of September 1946.

[SEAL]

MURIEL F. HALL, *Notary Public.*

My Commission expires March 28, 1949.

\* \* \* \* \*

Federal Communications Commission, Sept. 23, 1946  
Office of Secretary

Before the Federal Communications Commission

File No. MP-2115

(Filed August 27, 1946)

In the Matter of COASTAL PLAINS BROADCASTING CO., INC., VICE  
TARBORO BROADCASTING COMPANY, INC., TARBORO, NORTH CAROLINA,  
FOR MODIFICATION OF CP.

*Amendment to application*

Comes now Tarboro Broadcasting Company, Inc., applicant in the above entitled cause, and respectfully amends its application for modification of CP so as to change the name of the applicant corporation from Tarboro Broadcasting Company, Inc., to Coastal Plains Broadcasting Company, Inc. The change of this name was accomplished through an amendment to the charter of the applicant corporation, three copies of which are attached hereto.

Dated this 19 day of September 1946.

COASTAL PLAINS BROADCASTING CO., INC.

(Name of Applicant)

By John C. Hanner,  
JOHN C. HANNER,

*Secretary-Treasurer.*

(Authorized officer or attorney)

26 Subscribed and sworn to before me this 19th day of September 1946.

[SEAL]

W. E. PIERCE, *Notary Public.*

My commission expires May 29, 1948.

\* \* \* \* \*

Federal Communications Commission, Oct. 18, 1946

Office of Secretary

Before the Federal Communications Commission

File No. B3-P-4891

In the Matter of TARBORO BROADCASTING CO., TARBORO, NORTH CAROLINA, FOR CONSTRUCTION PERMIT

*Opposition to petition for reconsideration and hearing*

Tarboro Broadcasting Company by its Attorney hereby files its opposition to the Petition of WJR for reconsideration and hearing on its application, and respectfully requests the Commission to accept this opposition even though filed late (i. e., more than ten days after the petition was filed).

1. The Petitioner has not alleged that the proposed operation of Tarboro Broadcasting Company would cause any interference within the normally protected service area of station WJR.

2. The allegation of interference to a presently "interference free service area of WJR" is not supported by proof of the existence of such service. In fact, it is entirely likely that the signal intensity alleged to be interfered with by the proposed operation of Tarboro is already subject to a natural atmospheric noise level limitation of greater intensity (see affidavit of George C. Davis attached hereto as Exhibit A).

27 3. Petitioner in its allegation that WJR provides the best signal available over much of the area within which interference is alleged overlooks the assignment of two new standard broadcast stations to Alpena, Michigan, one new station to Petoskey, Michigan, one new station to Cadillac, Michigan, and the operation of WTCM at Traverse City, Michigan. All of these stations are rendering service to a large portion of the area in which interference free service is alleged by petitioner.

4. Petitioner has not alleged nor has it proven any interference within its normally protected contours. That such interference would not take place is clearly established by the affidavit of George C. Davis attached as Exhibit A.



Wherefore, the premises considered, it is respectfully requested that the Petition of WJR for reconsideration and hearing be denied and that the Tarboro Broadcasting Company be permitted to proceed with the construction of the station authorized by the Commission on August 22, 1946.

Respectfully submitted.

TARBORO BROADCASTING COMPANY,  
By Frank U. Fletcher,  
FRANK U. FLETCHER,

*Its Attorney.*

Dated October 18, 1946.

*Exhibit "A"*

Affidavit of George C. Davis

Pursuant to employment by the Tarboro Broadcasting Company, permittee of a new broadcast station at Tarboro, North Carolina, for operation with 1 kw. on 760 kc., daytime only, examination was made of a petition and affidavit filed by WJR in connection with this application, File No. B3-P-4891.

It is my opinion that the engineering considerations set forth in the affidavit attached to the petition do not give proper weight to certain very pertinent facts. Among these are the following:

1. The affidavit states that "over much of this region WJR provides the best signal available." This statement completely neglects the assignment of two new stations to Alpena, Michigan, of one new station to Petoskey, Michigan, one new station to Cadillac, Michigan, and the operation of WTCM, Traverse City, Michigan.

2. The affiant seeks to protect a signal on the order of 32 microvolts per meter or less from interference from other stations on the same frequency. The FCC Standards of Good Engineering Practice, Section 1, Table 4, indicates that Class 1A stations are protected from interference on the same frequency to the 100-microvolt-per-meter contour daytime. The permissible interference signal on the same channel for 100% of the daytime hours at the 0.1 mv/m contour of the Class 1A station may be as high as 5 microvolts per meter. (See Table 4, Section I, FCC Standards and footnote 3 to Table 4.) The petitioner is objecting to a signal which is not present 100% of the time and which is much less than the permissible 5 microvolts per meter signal.

3. The signal required to produce interference to a 32-microvolt-per-meter signal on the same frequency would be 1.6 microvolts

per meter (0.0016 mv/m). This signal is probably no greater limitation than occurs from natural atmospheric noise limitations to the signal of WJR. Figure 14-3, which is a map of the United States, and Figure 4-1, released in connection with the Clear Channel Committee noise studies, indicate that during daytime hours a signal level of approximately 0.3 mv/m would be required in the northern Michigan area on 760 kc. for reception to be free from atmospheric noise for 90% of the year. Similarly  
 29 Figure 12-3 of the proposed Standards of Good Engineering Practice indicates a signal level of from 30 to 40 microvolts will be required on 1000 KC for atmospheric-noise-free reception during daytime hours for 50% of the year. Applying the ratios of Figure 4-1, signal levels of from 38 to 51 microvolts would be required for atmospheric-noise-free reception on 760 KC for 50% of the year.

Therefore, it is my opinion that the operation of the station authorized to the Tarboro Broadcasting Company will not produce objectionable interference to the service of WJR within its normally protected contour.

The affiant states that he is consulting engineer for the Tarboro Broadcasting Company, Tarboro, North Carolina, and that his qualifications are a matter of record in the Federal Communications Commission.

George C. Davis.

GEORGE C. DAVIS.

Subscribed and sworn to before me this 15th day of October 1946.

MYRTLE A. HUFFER, *Notary Public*.

My Commission Expires April 30th, 1949.

30 F. C. C. Form No. 351. (Revised August 25, 1936.)  
 File No. B3-MP-2115, B3-P-4891.

Call letters WCPS

Federal Communications Commission

*Regular broadcast station construction permit and modification*

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofore or hereafter made thereunder, and further subject to the conditions set forth in this permit, authority is hereby granted to Coastal Plains Broadcasting Co., Inc., to construct a radio transmitting station located and described as follows:



1. Location of transmitter: State North Carolina, County Edgecombe, City or town, 2.7 miles NW. of Tarboro Street and number On U. S. Highway #64 N. Latitude: Degrees 35, minutes 55, seconds 40, W. Longitude: Degrees 77, minutes 34, seconds 15.

2. Location of main studio: State of North Carolina, County Edgecombe, City or town, 2.7 miles NW. of Tarboro Street and number on U. S. Highway #64.

3. Description of transmitting apparatus:

Raytheon Mfg. Co., Type RA-1000, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 500-watt vacuum tubes for high level modulation (RCA 833). Maximum rated carrier power output 1 kilowatt.

Antenna: 275' (280' over-all height) uniform cross-section, guyed, series fed, vertical radiator. Ground system consists of at least 90 radials 325' or more long of buried copper wire.

31. Tower to be painted and lighted in accordance with the attached specifications.

Power to be determined by the direct method (Sec. 3.51). The enclosed copies of FCC Form 306 should be submitted simultaneously with FCC Form 302.

4. The frequency, operating power, and hours of operation will be as follows:

(a) Frequency 760 kilocycles.

(b) Power (1) Night ———. (2) Day 1 kilowatt.

(c) Hours of operation Daytime as follows: Oct. 6:15 a. m. to 5:30 p. m.; Nov. 6:45 a. m. to 5:00 p. m.; Dec. 7:15 a. m. to 5:00 p. m.; Jan. 7:15 a. m. to 5:15 p. m.; Feb. 7:00 a. m. to 5:45 p. m.; Mar. 6:15 a. m. to 6:15 p. m.; Apr. 5:45 a. m. to 6:45 p. m.; May 5:00 a. m. to 7:15 p. m.; June 4:45 a. m. to 7:30 p. m.; July 5:00 a. m. to 7:30 p. m.: Eastern Standard Time.

5. Date of required commencement of construction By December 14, 1946.

6. Date of required completion of construction, June 14, 1947.

7. (a) Upon the completion of construction in exact accord with this permit, and provided the Commission and the Inspector of Radio are notified two days in advance, the permittee is authorized—

(1) To conduct equipment tests between 1 a. m. and 6 a. m., local standard time, for a period not to exceed 10 days, on the frequency and with the power herein specified.

(b) Upon the completion of equipment tests, and provided an application for radio broadcasting station license has been filed with the Commission, showing the transmitter to be in satisfactory operating condition; and provided further, that the Commission

7

and Inspector of Radio are notified two days in advance, the permittee is authorized—

(1) To conduct broadcast program tests for a period not to exceed 30 days, on the frequency, with the power, and during the hours of operation herein specified.

32 (c) The authority herein contained to conduct tests shall not be construed as a radio broadcasting station license, but only to make tests incident and necessary to proper construction of the station, and the Commission reserves the right to cancel or modify such authority.

8. This permit shall be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless completion of the station is prevented by causes not under permittee's control.

Dated this 14th day of October 1946.

By direction of the Federal Communications Commission,

[SEAL]

T. J. SLOWIE, *Secretary*.

\* \* \* \* \*

File No. B2-R-331. Official No. 331. Call letters WJR

Federal Communications Commission

*Radio broadcasting station license*

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofore hereafter made by this Commission, and further subject to conditions set forth in this license, the Licensee WJR, The Goodwill Station, Inc., is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning November 1, 1946, and ending November 1, 1949.

The licensee shall use and operate said apparatus only in accordance with the following terms:

33 1. On a frequency of 760 kc.

2. With power of 50 kilowatts, with an additional  
\* \* \* watts from local sunrise to local sunset only. Antenna  
current 23.06 amperes for 50 kilowatts; \* \* \* amperes for  
\* \* \* watts. Antenna resistance 94 ohms.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters WJR.

5. With the main studio of the station located at: 2800 Fisher Building, West Grand and Second Boulevards, Detroit, Michigan.



The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

The apparatus hereinabove authorized to be used and operated is located at:

Wyandotte, S. W. Corner Sibley and Grange Road, approximately 16 miles south of Detroit, Michigan, Lat.  $42^{\circ}10'07''$  North, Long.  $83^{\circ}13'00''$  West, and is described as follows: Western Electric, Type 306-B, Broadcasting Transmitter. Serial N. 101. Direct Crystal Control. Last radio stage: six 8.5 kilowatt vacuum tubes for low level modulation (Federal 342-A). Maximum rated carrier power output 50 kilowatts. Antenna: Single uniform cross-section tower; height of vertical lead, 700'; over-all height above ground, 710'. Ground system consists of 120 radials 600' long, buried 8". Tower painted and lighted in accordance with the attached specifications.

For emergency purposes only, when by reason of breakdown or similar reason the said apparatus cannot be used, the licensee is authorized to use and operate (but only in accordance with the terms and conditions of this license) the auxiliary radio transmitting apparatus located at:

Wyandotte, S.W. Corner Sibley and Grange Road, approximately 16 miles south of Detroit, Michigan, with power of: 10 kilowatts. Antenna current—10.31 amperes for 10 kilowatts; antenna resistance—94 ohms, and described as follows:

Western Electric, Type 105-C-modified, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: four  $2\frac{1}{2}$  kilowatt vacuum tubes for low level modulation (Federal Telegraph 320-B). Maximum rated carrier power output 10 kilowatts.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings herein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of

the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 31st day of October 1946.

By direction of the Federal Communications Commission,

[SEAL]

T. J. SLOWIE, *Secretary*.

U. S. Government Printing Office 16—3976.

\* \* \* \* \*

35 Before the Federal Communications Commission

File No. B3-P-4891

IN RE APPLICATION OF TARBORO BROADCASTING COMPANY, INC.,  
TARBORO, NORTH CAROLINA, FOR CONSTRUCTION PERMIT

*Decision and order on petition for reconsideration*

By the Commission:

The Commission has before it a petition for reconsideration filed September 10, 1946, by WJR, The Goodwill Station, Inc., licensee of Radio Station WJR, which is a Class I-A station operating on 760 kc., with 50 kw. power, unlimited time, at Detroit Michigan, directed against the Commission's action of August 22, 1946, granting without hearing the application of Tarboro Broadcasting Company, Inc., for a construction permit to erect a new standard broadcast station to operate on 760 kc., with 1 kw. power, daytime only (Class II), at Tarboro, North Carolina (File No. B3-P-4891). On October 18, 1946, Tarboro Broadcasting Company, Inc., filed an opposition to the petition.

The petition requests the Commission to reconsider its action and designate for hearing the application of Tarboro Broadcasting Company, Inc., making the petitioner a party to the hearing, or, in the alternative, "to hold in abeyance any grant of such application pending a decision in the Clear Channel case, Docket No. 6741." In support of these requests, the petitioner contends that the proposed operation of the Tarboro Broadcasting Company, Inc. station will cause objectionable interference to the present interference-free service area of Station WJR in all of upper Michigan and in twelve counties in lower Michigan; that the "FCC Radio Survey, July, 1945," Volume III, Part 1—Tables 1—

17, shows that Station WJR is the most listened to station, 36 both day and night, in the "Cutover" region in which the interference area is located, and that, therefore, a substantial number of listeners in this area now depending upon Station WJR's service will be deprived of such service through the operation of the proposed Tarboro station; that the grant of the Tar-



boro application may make it difficult or impossible to determine in the Clear Channel hearing whether the present power and service area of Station WJR should be increased. The opposition to the petition states that the petitioner does not allege interference within the normally protected service area of Station WJR; that the allegation of interference is not supported by proof of the existence of such service; and that other stations now and in the future will serve the interference area described by the petitioner.

Station WJR is a Class I-A station. Under the Commission's Rules and Standards, Class I-A stations are normally protected daytime to the 100 microvolt-per-meter contour. The area sought by petitioner to be protected is, according to the engineering affidavit accompanying the petition, served by Station WJR during the daytime with a signal intensity of 32 microvolts-per-meter or less, and is therefore outside the normally protected contour.<sup>1</sup>

Interpreting the alternative prayer of the petition, "to hold in abeyance any grant of such application pending a decision in the Clear Channel case, Docket No. 6741," to be a request to have the Commission set aside the grant made on August 22, 1946, to Tar-

37 boro Broadcasting Company, Inc., and to place the application in the pending files, we are impelled to deny it. The

Tarboro application complied with the requirements of the Communications Act of 1934, as amended, and with the Rules and Regulations and Standards established by the Commission. The application complied, more particularly, with Section 3.25 (a) of the Rules and with the policy announced in the Public Notice of June 21, 1946 (Mimeo. No. 95034), governing allocation of Class II stations to Class I-A frequencies. We conclude that it would not serve the public interest to set aside the grant and withhold action on this application, which complies in every respect with the Rules and policy of the Commission, and which proposes a new service to 274,307 persons in an area of 4,540 square miles, because of the possibility that the grant might affect the future assignment of facilities of Station WJR upon the termination of the Clear Channel hearing.

Reconsidering the application of Tarboro Broadcasting Company, Inc., in the light of the petition for reconsideration and hearing, and the opposition thereto, we find no reason to set aside or modify our action of August 22, 1946, granting the application.

<sup>1</sup> No question is here raised as to the applicability of the following provision of the Standards of Good Engineering Practice Concerning Standard Broadcast Stations (Page 4) :

"When it is shown that primary service is rendered \* \* \* beyond the normally protected contour, and when primary service to approximately 90 percent of the population \* \* \* of the area between the normally protected contour and the contour to which such station actually serves, is not supplied by any other station or stations carrying the same general program service, the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration."

Accordingly, it is ordered, this 17th day of December 1946, that the petition for reconsideration filed by WJR, The Goodwill Station, Inc. (WJR), Detroit, Michigan, be, and it is hereby, denied.

FEDERAL COMMUNICATIONS COMMISSION.

\* \* \* \* \*

Federal Communications Commission

Docket No. 6741

In the Matter of CLEAR CHANNEL BROADCASTING IN THE STANDARD BROADCAST BAND.

*Petition for reconsideration*

The Clear Channel Group, by its attorney, hereby petitions the Commission as follows:

38 1. To reconsider its action of June 21, 1946, whereby it adopted a policy of considering on "their individual merits" applications involving use of 1-A channels, daytime or limited time, where the proposed station is 750 miles or less from the dominant 1-A station using a nondirectional antenna on the frequency requested or is within the 500 microvolt per meter 50% skywave contour of the dominant class 1-A station using a directional antenna and of granting such applications conditionally for daytime operation only; and to hold in abeyance action on all such applications pending final decision of the issues herein; or in the alternative, to designate such applications for hearing.

In Support Whereof petitioner states:

2. Since the announcement of the June 21st policy, the Commission has granted eleven new applications for use of 1-A channels, daytime only, as follows:

(B3-P-4863) Bay Broadcasting Company, Goose Creek, Texas; for 650 kc., 250 watts, daytime only; granted August 29, 1946.

(B2-P-4966) Southern Virginia Broadcasting Corp., Crewe, Virginia; for 650 kc., 1 kw., daytime only, granted September 19, 1946.

(B2-P-3670) Altoona Broadcasting Co., Altoona, Pa.; for 650 kc., 250 watts, daytime only, granted September 30, 1946.

(B3-P-4699) Greenville Broadcasting Co., Greenville, South Carolina; for 660 kc., 5 kw., daytime only, granted August 7, 1946.

(B3-P-4891) Tarboro Broadcasting Co., Tarboro, North Carolina; for 760 kc., 1 kw., daytime only; granted August 22, 1946.

(B3-P-4426) Stillwater Publishing Co., Stillwater, Okla.; for 840 kc., 250 watts, daytime only; granted August 1, 1946.



(B3-P-3745, Docket 6880) Pursley Broadcasting Service, Mobile, Alabama; for 840 kc., 1 kw., daytime only; granted June 21, 1946.

39 (B3-P-4886) Variety Broadcasting Co., Dallas, Texas; 1040 kc., 1 kw., daytime only; granted August 7, 1946.

B1-P-4928) Broadcasting Management, Inc., Bethesda, Md.; for 1120 kc., 250 watts, daytime only; granted September 12, 1946.

(B3-P-4882) The Voice of Thomaston, Thomaston, Ga.; for 1120 kc., 250 watts, daytime only; granted October 3, 1946.

(B2-P-4894) Lake Huron Broadcasting Co., Saginaw, Michigan; for 1210 kc., 1 kw., daytime only; granted August 22, 1946.

3. In addition, the Commission has granted fourteen new applications for use of 1-B channels as follows:

(B3-P-4963) Coosa Valley Radio Co., Rome, Ga.; 710 kc., 1 kw., daytime only; granted September 19, 1946.

(B3-P-4167, Docket 7161) The Times Picayune Publishing Co., New Orleans, La.; 940 kc., 1 kw., daytime; granted September 12, 1946.

(B3-P-4642) Goggan Radio Sales, Henderson, Texas; 1000 kc., 250 watts, daytime only; granted August 9, 1946.

(B4-P-4654) Belleville Broadcasting Co., Belleville, Ill.; 1060 kc., 250 watts, daytime only; granted August 2, 1946.

(B2-P-4023) Palladium Publishing Co., Benton Harbor, Mich.; 1060 kc., 1 kw., daytime only; granted July 11, 1946.

(B3-P-4884) Alice Broadcasting Co., Alice, Texas; 1070 kc., 1 kw., daytime only; granted August 1, 1946.

(B3-P-4199, Docket 7533) The High Point Enterprise, Inc., High Point, N. C.; 1070 kc., 1 kw., daytime only; granted September 5, 1946.

(B3-P-4514, Docket 7451) W. Walter Tison, Tampa, Florida; 1110 kc., 1 kw., daytime only; granted July 18, 1946.

(P5-P-4785) Radio Diruba Co., Diruba, Calif.; 1130 kc., 250 watts, day; granted July 18, 1946.

(B5-P-4669) Silver Gate Broadcasting Co., San Diego, Calif., 1130 kc., 250 watts, day; granted July 11, 1946.

40 (B3-4952) Alfred Achilles Corcanges, Mineral Wells, Texas; 1140 kc., 250 watts, day; granted September 12, 1946.

(B2-P-4852) The Adrian Broadcasting Co., Adrian, Mich., 1500 kc., 250 watts, day; granted August 7, 1946.

(B3-P-4977) Rome Broadcasting Co., Rome, Ga., 1190 kc., 1 kw., daytime only; granted September 19, 1946.

(B4-P-4833) W-A-U-K Broadcasting Co., Waukesha, Wis.; 1510 kc., 250 watts, day; granted July 25, 1946.

(B1-P-3277) Eastern Broadcasting Co., Inc., Oyster Bay, Long Island, New York; 1520 kc., 250 watts, daytime only; granted September 19, 1946.

4. Furthermore, since the announcement of the policy, the Commission has granted numerous applications for use of channels adjacent to 1-A and 1-B frequencies.

5. There are now pending before the Commission a large number of applications requesting facilities on or adjacent to 1-A and 1-B channels, similar to those which the Commission has already granted.

6. Among the issues to be determined in the proceedings herein is whether or not higher power should be authorized on clear channels. The Commission's policy announcement of June 21, 1946, referred to above, was not accompanied by any statement of the reasons for the adoption of such policy, or for making a distinction between daytime stations located less, and daytime stations located more, than 750 miles from the dominant station. Nor was there any explanation as to what "individual merits" would warrant daytime duplication on 1-A channels. Moreover, no policy was announced respecting assignments on 1-B channels or assignments on channels adjacent to 1-A and 1-B frequencies.

7. There was no indication that the Commission's policy announcement was intended to be a decision on any of the issues herein. However, the specific grants referred to above made since June 21, 1946 and the grant of others like them, may have the force and effect, among other things, of making more difficult the

41 grant of increased power to Clear Channel stations. Actions adversely affecting the proper determination of such an important broad issue, through the granting of specific applications prior to a consideration of all the evidence already presented and to be presented in further proceedings herein, are or may be ill-advised and contrary to public interest, convenience or necessity.

8. The above entitled proceeding has been in process since February 1945 and, during the intervening period, technical committees established by the Commission, headed by members of the Commission's engineering staff and comprising the leading technical experts in the country on broadcast allocation engineering, have undertaken comprehensive investigations and studies, and have made reports. These investigations, studies, and reports have involved great expenditures of time and money on the part both of the Commission and of all important groups in the industry. Hearings have been held from time to time since January 1946, but the final and more important portion of the hearing has not yet been held, in which it will or may be determined whether and to what extent, and in what manner, to give effect to the expert findings of the technical committees. Premature granting of daytime station applications such as those under dis-



cussion seems certain to make more difficult and perhaps even to foreclose, giving proper effect to said findings.

9. Petitioner intends to show in further proceedings herein that greatly increased power should be permitted on a large number of clear channels, including some channels now classified as 1-B. The Commission's actions referred to above run the danger of prejudicing petitioner's case in this respect and of increasing the problems and obstacles which have to be overcome by the Commission in providing improved service to rural areas and the smaller cities and towns not now having adequate service.

10. At the hearing on July 2, 1946, in this proceeding, petitioner's counsel stated orally the objections of petitioner  
42 to the Commission's announced policy and the Commission, through the Chairman, stated that the protest would be taken under advisement (R. 3625-3626). To date, however, there has been no announcement of any decision of the Commission on the protest, except to the extent that the individual grants referred to above may be interpreted as a decision on this matter.

Wherefore, petitioner requests the Commission to take the action set forth in paragraph 1 above.

Respectfully submitted.

CLEAR CHANNEL GROUP.

By LOUIS G. CALDWELL, *Its Attorney.*

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### Federal Communications Commission

In the Matter of PETITION OF CLEAR CHANNEL GROUP FOR RECONSIDERATION OF THE COMMISSION'S POLICY WITH RESPECT TO LICENSING OF STATIONS ON CLEAR CHANNELS AND CHANNELS ADJACENT TO CLEAR CHANNELS

### *Memorandum opinion*

This matter comes before the Commission on a petition filed by the Clear Channel Group on October 8, 1946, requesting the Commission to reconsider its policy with respect to the licensing of stations to operate on clear channels and on channels adjacent to clear channels.\* Pursuant to this policy the Commission has dismissed all applications requesting permission to operate full-time on any I-A channel or to operate on such channels with power in excess of 50 kilowatts. The Commission has also, pursuant to this policy, placed in the pending files all appli-  
43 cations for daytime operation on a I-A channel where the proposed station is more than 750 miles from the dominant station using a nondirectional antenna or is beyond the 0.5 milli-

\*On November 13, 1946, the Commission announced that it had denied the instant petition and that an opinion setting forth the Commission's reasons would be issued at a future date.

volt per meter 50% skywave contour of the dominant Class I-A station using a direction antenna on the frequency requested. Application for daytime operation on I-A stations within a lesser distance and all other applications are considered by the Commission on their merits.

The petition points out that under the foregoing policy the Commission has granted numerous applications for daytime operation on I-A channels and for stations on channels adjacent to I-A and I-B frequencies and that there are many such applications still pending before the Commission. The petition further points out that the order in the clear channel hearing (Docket No. 6741) places in issue the possibility of a revision of the Commission's present rules limiting maximum power to 50 kilowatts. According to the petition the licensing of daytime stations on I-A channels or the licensing of stations on channels adjacent to clear channels may have the effect "of making more difficult the grant of increased power to clear channel stations."

The Commission is of the opinion that a grant of the instant petition would not be in the public interest. If the petition were granted, it would mean that no action could be taken on any application for operation on the frequencies 610 kc. to 1590 kc. since all of these frequencies are either I-A channels or are adjacent (within 30 kc.) to I-A channels. The net result would be to preclude the Commission to a very large extent from exercising its licensing functions.

Nor is there any valid reason for withholding action on those applications requesting authority to operate on clear channels in accordance with the Commission's policy. These applications are consistent with the Commission's Rules and Regulations and fulfill a definite public need. Thus, a review of the Commission's records discloses that since October 8, 1945—the date on 44 which the Commission resumed its normal licensing following the lifting of the wartime freeze—48 construction permits for new stations have been issued for daytime operation on I-A channels and 55 construction permits for new stations have been issued for operation on I-B channels, almost all of the latter being for daytime operation. Of these 103 construction permits which have been granted, more than half (53) have been in cities having no other standard broadcast station. With the difficulty of finding room in the standard broadcast band for additional stations, it is apparent that cities without any service or with inadequate service must rely to a very large extent on daytime stations which are licensed to operate on clear channels.

Moreover, a review of the applications for daytime operation on clear channels shows that many of these applicants are also



desirous of entering FM broadcasting and are utilizing their daytime operation in helping them finance their operation during the transition period until FM becomes firmly established. In the Commission's opinion, this assistance to the establishment of FM broadcasting is in the public interest and is an additional reason for denying the relief requested.

The denial of the petition of the Clear Channel Group will not, in the Commission's opinion, adversely affect the outcome of the clear channel hearing. The Commission has already announced that no applications will be accepted for nighttime operation on a I-A channel until after the conclusion of the clear channel hearing; hence there is no possibility of any I-A channel being duplicated nighttime before the clear channel hearing is concluded.

So far as the possibilities of higher power are concerned, the Commission's present policy will not operate as a bar if the Commission determines to amend its rules and allow higher power. Applications for stations on I-A channels more than 750 miles from the dominant stations are placed in the pending files in accordance with the Commission's policy. Applications for stations within 750 miles of the dominant I-A station must be designated for hearing if they involve interference to the normally protected contour of the I-A station. Hence, there is only a very limited area where daytime stations can be placed so far as I-A channels are concerned.

It is of course recognized that any increase in power of existing I-A stations or the relocation of such stations may result in interference to the normally protected contour of such stations from the new daytime stations, where none exists today. However, the same situation may arise with respect to existing stations. Problems of relocation are bound to be very difficult in any event. The addition of new stations may make it somewhat more difficult. However, when it is remembered that it will always be easier to find room for daytime stations than for fulltime stations, it should not by any means prove to be insuperable to find assignments for those daytime stations in existence at the conclusion of the clear channel hearing, if a reallocation proves to be necessary.

There remains the problem involved in possible skywave interference during the daytime. Under the present Rules and Regulations and Standards of Good Engineering Practice, no station is protected against skywave interference during the daytime. If the power of existing I-A stations is raised substantially, it may very well be that daytime skywave interference will become a problem that should be dealt with in the Rules and Regulations or Standards of Good Engineering Practice. However, it should be pointed out that this will be true for existing daytime stations

as well as for new stations; the problem therefore is not created by the licensing of the new stations. Moreover, the clear channel hearing includes an issue concerning possible revision of the rules and regulations governing the hours of operation of daytime stations on clear channels. Under this issue all relevant evidence can be introduced by petitioner as well as other interested persons concerning daytime skywave interference and the desirability of revising Commission rules for operation of daytime stations. Any grants that are made to daytime stations are subject to whatever changes in the rules may be made as a result of the clear channel hearing.

For the foregoing reasons the petition of the Clear Channel Group is denied.

FEDERAL COMMUNICATIONS COMMISSION.  
T. J. SLOWIE, *Secretary*.

Adopted: January 2, 1947.

46-A SS-575

Interview Sample

DEPARTMENT OF COMMERCE—BUREAU OF THE CENSUS  
FCC RADIO SURVEY

TABLE 15-8.—Households reporting specific class 1A stations heard and percent hearing these without trouble, day (Q. 4) and night (Q. 5)

CUTOVER REGION

Call letters	Households reporting stations heard during—			
	Day		Night	
	Total number	Percent hearing without trouble	Total number	Percent hearing without trouble
KDKA	27	0	298	88
KMOX	912	22	1,333	79
WABC			141	100
WBAP			654	100
WBBM	13,966	28	19,394	63
WBZ			8	100
WCCO	50,007	67	47,283	71
WEAF			8	100
WENR	6,882	53	9,930	83
WFAA			698	100
WGN	42,805	48	62,601	72
WHAM	654	0		
WHAS	141	0	537	74
WHO	23,507	84	26,482	88
WJR	74,240	83	77,328	89
WLS	33,699	45	42,635	57
WLW	5,232	35	7,408	44
WMAQ	15,180	75	16,898	74
WSB	885	0	1,140	100
WSM	5,749	16	18,008	44
WTAM	465	4	515	31
WWL			557	100



46-B SS-575

Interview Sample

DEPARTMENT OF COMMERCE—BUREAU OF THE CENSUS  
FCC RADIO SURVEY

TABLE 16-8.—Households reporting specific class IB stations heard and percent hearing these without trouble, day (Q. 4) and night (Q. 5)

CUTOVER REGION

Call letters	Households reporting stations heard during—			
	Day		Night	
	Total number	Percent hearing without trouble	Total number	Percent hearing without trouble
KOA	730	100	4,303	100
KSTP	15,765	32	12,304	56
WCFL	194	10	19	100
WJZ	718	0	718	48
WOWO	576	3	557	0
WRVA	288	0	141	10

46-C SS-575

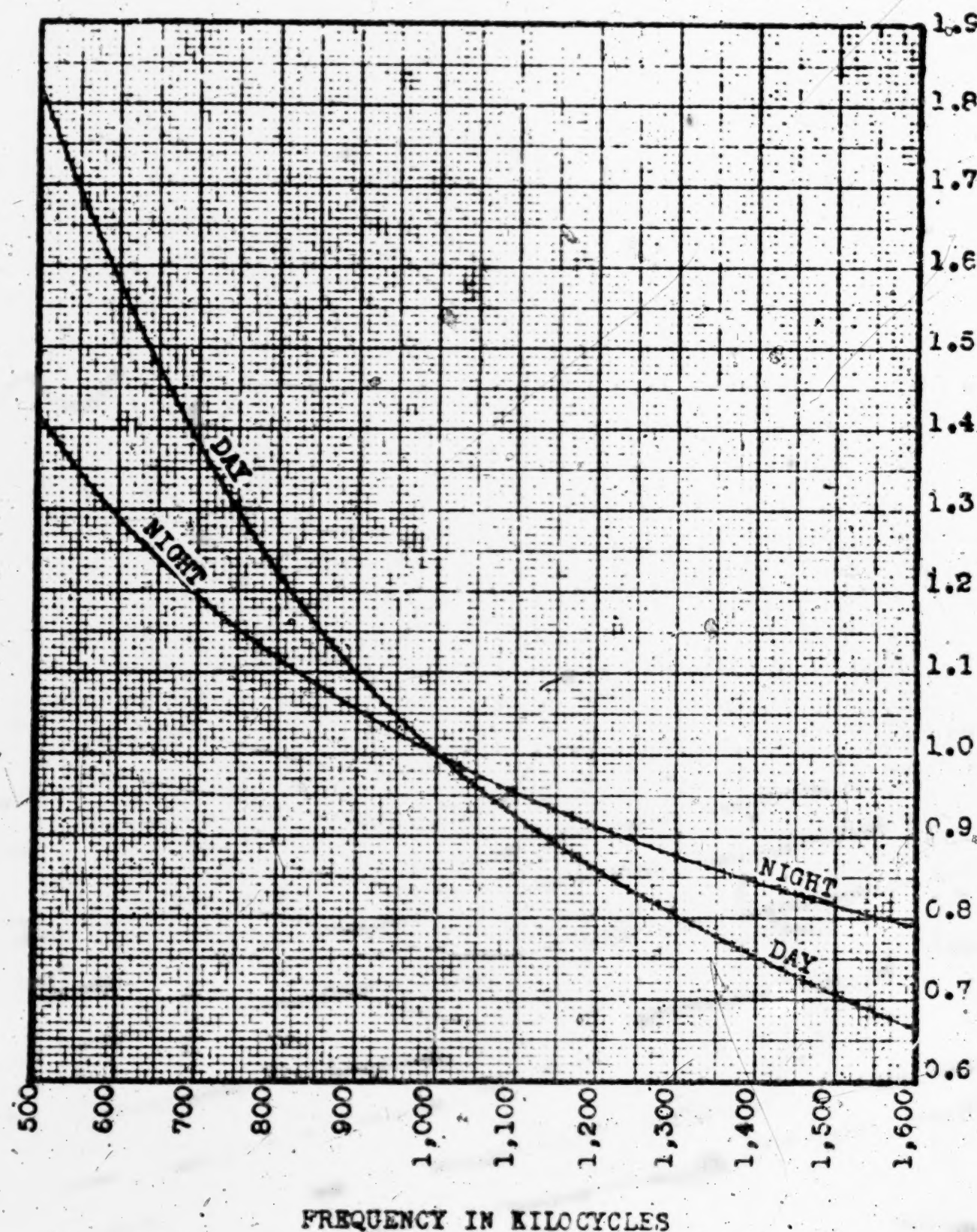
Interview Sample

DEPARTMENT OF COMMERCE—BUREAU OF THE CENSUS  
FCC RADIO SURVEY

TABLE 17-8.—Households reporting specific class II stations heard and percent hearing these without trouble, day (Q. 4) and night (Q. 5)

CUTOVER REGION

Call letters	Households reporting stations heard during—			
	Day		Night	
	Total number	Percent hearing without trouble	Total number	Percent hearing without trouble
KUOM	490	71	141	0
WAIT	19	100	19	100
WBZA			8	100
WCAL	1,003	65	1,003	65
WCAR	1,184	57	510	0
WDGY	6,083	45	3,089	54
WHN	255	0		
WJJD	5,716	23	11,669	42
WJW	347	0		
WKAR	20,895	76	6,943	65
WMBI	576	50		
WOL	2,667	95	208	100
WPAG	885	100		

46-D RELATIVE SIGNAL INTENSITIES FOR ATMOSPHERIC-FREE  
RECEPTION VS. FREQUENCY

FREQUENCY IN KILOCYCLES

RELATIVE SIGNAL INTENSITY

FIGURE 4-1



46-E

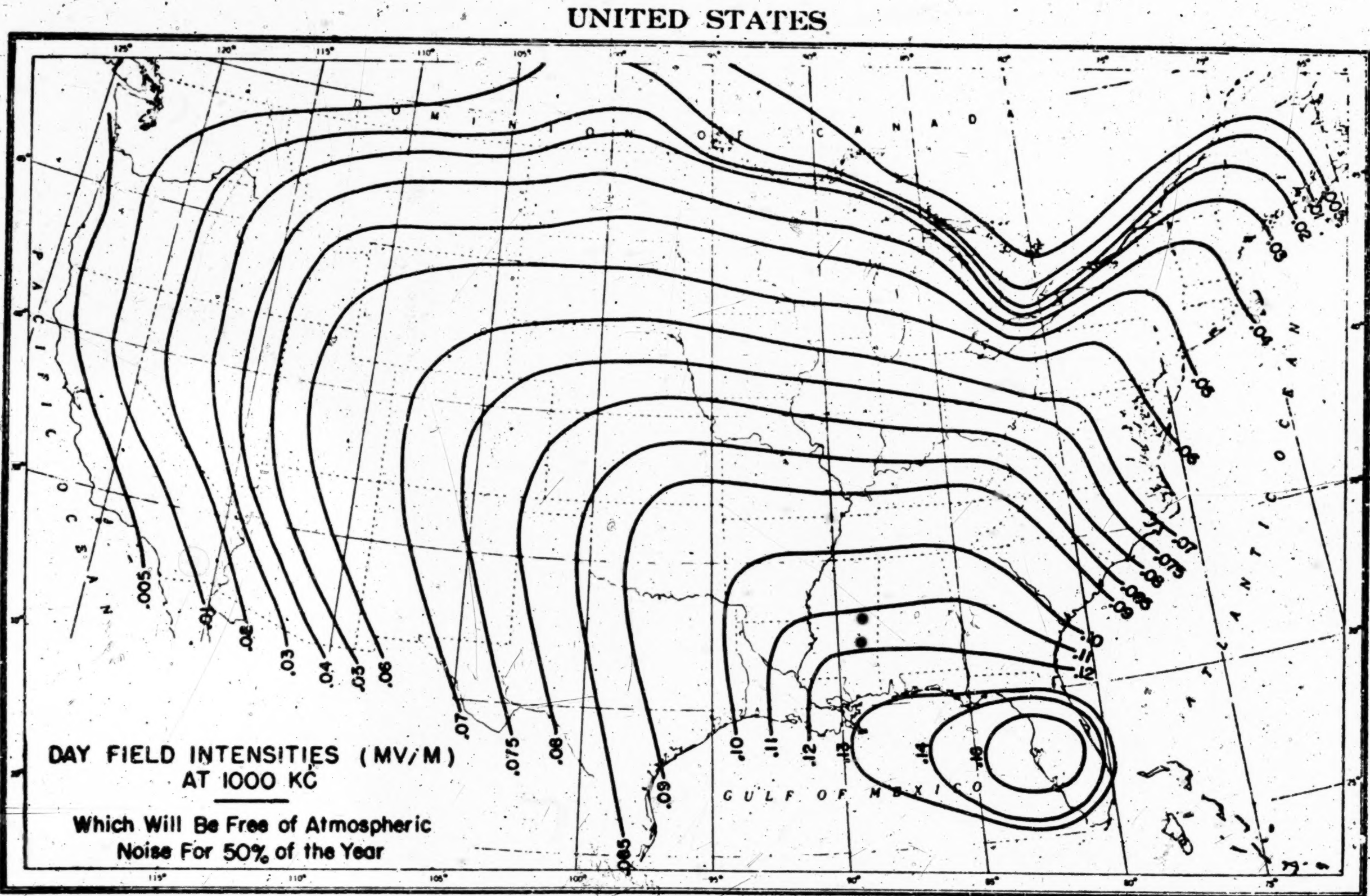


FIGURE 12-3



47 United States Court of Appeals, for the District of Columbia  
Circuit

WASHINGTON 1, D. C.

JOSEPH W. STEWART, *Clerk.*

May 22, 1947.

No. 9464, *WJR, the Good Will Station v. F. C. C.*

DEAR SIR:

The above entitled case has been set down for rehearing on June 11, 1947, at 10:30 A. M. Thirty minutes will be allowed on each side for argument.

It is the desire of the Court that the case be reargued on all points.

*The court in particular requests, however, the presentation of argument and authorities in respect of the effect of the Communications Act, the rules and regulations of the Commission, and the due process clause of the Fifth Amendment upon the claimed right of hearing before the Commission upon the question whether the grant of the new application will operate as a modification of the existing license.*

Very truly yours,

JOSEPH W. STEWART,  
*Clerk.*

LOUIS C. CALDWELL, *Esquire,*  
REED T. ROLLO, *Esquire,*  
PERCY H. RUSSELL, JR., *Esquire,*  
KELLEY E. GRIFFITH, *Esquire,*  
914 National Press Building,  
Washington 4, D. C.

*Filed Oct. 7, 1948. Joseph W. Stewart, Clerk*

No. 9464

WJR, THE GOODWILL STATION, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE,  
COASTAL PLAINS BROADCASTING COMPANY, INC., INTERVENER

*Appeal from the Federal Communications Commission*

Reargued June 11, 1947\*

Decided October 7, 1948

Mr. Kelley E. Griffith, with whom Messrs. Louis G. Caldwell, Reed T. Rollo and Percy H. Russell, Jr., were on the brief, for appellant.

Mr. Max Goldman, Attorney, Federal Communications Commission, with whom Mr. Benedict P. Cottone, General Counsel, Mr. Harry M. Plutkin, Assistant General Counsel, and Mr. Paul Dobin, Attorney, Federal Communications Commission, who entered appearances, were on the brief for appellee.

Mr. Frank U. Fletcher, who entered an appearance, for intervenor.

Mr. Robert T. Barton, Jr., who was permitted to argue as *amicus curiae*, urged affirmance.

Before STEPHENS, EDGERTON, CLARK, WILBUR K. MILLER and PRETTYMAN, Associate Justices.

STEPHENS, Associate Justice: This is an appeal by WJR, The Goodwill Station, Inc. (hereafter referred to as WJR), from a decision of the Federal Communications Commission of August 22, 1946, granting without hearing the application of the Coastal Plains Broadcasting Company, Inc., the intervenor herein (hereafter referred to as Coastal Plains), for a construction permit to erect a new standard broadcast station.<sup>1</sup> WJR seeks relief also in the appeal from a decision and order of the Commission of December 17, 1946, denying without hearing the appellant's petition for reconsideration of the Commission's decision of August 22, 1946.

\* Originally argued March 13, 1947, before Grover, Chief Justice, and Clark and Prettyman, Associate Justices; reargued by direction of the court before Stephens, Edgerton, Clark, Wilbur K. Miller and Prettyman, Associate Justices, June 11-12, 1947.

<sup>1</sup> The application for the permit was made by, and the permit was granted to, the Tarboro Broadcasting Company, Inc., but before this appeal was taken that company changed its name to Coastal Plains Broadcasting Company, Inc.



Station WJR, located in Detroit, Michigan, is a Class I-A clear channel station with non-directional antenna, licensed by the Commission to broadcast without time limit on an assigned frequency of 760 kilocycles with 50 kilowatts power, the maximum power with which any station may operate under Section 3.22 of the Commission's Rules and Regulations (hereafter referred to as rules). In 1945 in response to the request of several Class I-A stations for increases in authorized power and in response to the requests of other parties for new stations to operate on Class I-A channels, the Commission instituted a rule making proceeding called the "Clear Channel Hearing." This hearing, as characterized by the Commission in its order for the same, was for the purpose, among other things of determining "What minimum power and what maximum power should be required or authorized for operation on clear channels" and "Whether and to what extent the authorization of power for clear channel stations in excess of 50,000 watts [50 kilowatts] would unfavorably affect the economic ability of other stations to operate in the public interest." During the pendency of this Clear Channel Hearing the Commission on June 21, 1946, announced a policy of considering on their individual merits applications involving use of I-A channels, daytime or limited time, where the proposed station is 750 miles or less from the dominant I-A station using a non-directional antenna on the frequency requested. It was pursuant to this policy that the Commission on August 22, 1946, granted the application of Coastal Plains for a permit to construct a radio station. This station was to be located at Tarboro, North Carolina, for operation with 1 kilowatt power daytime only on a 760 kilocycle frequency, to wit, the same frequency as that on which, as above stated, WJR operates.

Pursuant to Section 405 of the Communications Act, 47 U. S. C. § 151, *et seq.* (1946), WJR filed with the Commission a petition for reconsideration of the decision of August 22, 1946. Therein it requested that the Coastal Plains application be designated for a hearing before the Commission in which WJR could participate. WJR alleged that its present interference-free service area would be subjected to objectionable interference by the operation of the Coastal Plains station. An engineering affidavit filed in support of the petition stated that the service of WJR would be interfered with between 10 a.m. and 2 p.m. in all of upper Michigan and in several counties or fractional parts of counties in lower Michigan, an area in which the field intensity of WJR averages 32 microvolts per meter or less during daytime hours, and stated further that in much of this region WJR provided the best signal available. WJR's petition alleged also that the "FCC Radio Survey, July 1945," a part of the record in the Clear Channel Hearing, showed it was the

most listened to station in the areas of Michigan above mentioned. In effect WJR's petition asserted that granting the Coastal Plains application would constitute an indirect modification of WJR's license. As an alternative to its prayer for a hearing WJR requested that action on the Coastal Plains application be deferred until the conclusion of the Clear Channel Hearing, asserting as a foundation for this alternative request that if the Commission as a result of the Clear Channel Hearing should amend its rules so as to permit clear channel stations to operate with increased power, a prior grant of the Coastal Plains application would make it difficult for the Commission to grant any increase to WJR.

50 Coastal Plains filed with the Commission an opposition to the petition of WJR. The opposition was, so far as here pertinent, in effect what in common law terms is a demurrer, and under modern practice a motion to dismiss; that is to say, the opposition raised the question whether or not the allegations in the petition, assuming their truth, showed that the operation of the Coastal Plains station would cause objectionable interference to WJR within its normally protected contour and service area as defined by the Commission's rules and Standards of Good Engineering Practice (hereafter referred to as standards).

By its decision and order of December 17, 1946, the Commission denied without a hearing of any kind WJR's petition for reconsideration. In so ruling it treated the petition as if on demurrer. In its decision the Commission ruled that WJR was not entitled to be heard in respect of the application of Coastal Plains for the reason that under the Commission's rules and standards WJR as a Class I-A station was normally protected daytime to the 100 microvolt per meter contour, and that the area which it sought to have protected by virtue of its petition and supporting affidavit was served during the daytime with a signal intensity of 32 microvolts per meter or less and was therefore outside the normally protected contour. With reference to the alternative request of WJR, the Commission ruled that it would not serve the public interest to refuse licenses on Class I-A frequencies to Class II stations such as Coastal Plains because of the possibility that the Commission might determine in the Class Channel Hearing that the power of Class I-A stations should be increased.

The questions for decision in the appeal are: I. Whether in accordance with WJR's alternative prayer action on the Coastal Plains application should be deferred until conclusion of the Clear Channel Hearing. II. If the answer to this question is in the negative, is WJR entitled to a hearing before the Commission as to the sufficiency of the allegations of its petition, assuming their truth, to show indirect modification of its license by the granting of the Coastal Plains application. III. If the answer to this question is in the affirmative, i.e., if the Commission erred in its denial



of such a hearing, may this court nevertheless rule upon the question whether the decision of the Commission—that the allegations of WJR's petition, assuming their truth, do not show an indirect modification of its license by the granting of the Coastal Plains application—was correct. IV. Whether WJR's prayer for hearing fails to request the hearing for which it contends on this appeal and whether this failure forecloses WJR's right to such a hearing.

## I

Should the Commission's action on the Coastal Plains application be deferred, in accordance with WJR's alternative prayer, until the conclusion of the Clear Channel Hearing: The answer to this question is in the negative. It is true that if as a result of the Clear Channel Hearing WJR's power were increased substantially above its 50 kilowatt authorization, its 100 microvolt per meter contour would be correspondingly increased and the operation of the Coastal Plains station might then cause interference within that protected area. But there are two difficulties with WJR's contention in this aspect of the case. First, to sustain WJR's contention it must be assumed (1) that the Commission will amend its rules so as to permit clear channel stations to operate with increased power; (2) that WJR will itself be granted an increase in power and that the resultant protected area under its license will be sufficiently extensive to include the area in which the operation of the Coastal Plains station will cause objectionable interference within the rules and standards of the Commission. WJR has no present rights in these supposititious eventualities. Second the contention of WJR would require this court to direct the order in which the Commission shall consider its cases. This we cannot do. If by reason of procedural malarrangement the Commission commits error in the disposition of a given case that error can be considered as can any other. But this court cannot direct in advance the order of precedence in the Commission's calendar.

## II

Preliminarily it is to be noted that in such cases as this case and *L. B. Wilson, Inc. v. Federal Communications Commission*, No. 9434, decided by this court April 12, 1948, hereafter referred to as the *Wilson case*, there are two principal issues. The first is whether the operation of the applicant station (such as Coastal Plains) will cause "objectionable interference" to the outstanding station (such as WJR) within its "protected contour" (within the technical meaning of the quoted terms under the Communications Act and the rules and standards of the Commission), i.e., whether there will result from the granting of a permit to the applicant station an indirect modification of the outstanding station's license.

The second issue, which arises only upon an affirmative answer to the first, is whether the public interest, convenience and necessity (hereafter referred to as public interest) require this interference, i.e., this indirect modification of the outstanding license. No hearing need be held on the second issue—no determination thereof need be made—unless the first issue is determined in the affirmative. But if the first is determined in the affirmative, then there must be a hearing on the second—this under the ruling in *Federal Communications Commission v. National Broadcasting Co., Inc. (KOA)*, 319 U. S. 239 (1943) (hereafter referred to as the KOA case). In determining the answer to the first principal issue the Commission may deal separately with two questions, one of law, the other of fact: In dealing with the first question the Commission will determine whether or not the petition of the outstanding station (requesting a hearing as to the propriety of the grant of a license to the applicant station) alleges facts which if true "show" that objectionable interference within the protected contour of the outstanding station will be caused by operation of the applicant station. This is a question of law to be answered in terms of the Communications Act, the Commission's rules and standards, and pertinent judicial decisions. In determining this question first the Commission is in effect treating the petition of the outstanding station as if on demurrer.<sup>2</sup> If this question is answered in the negative, 52 the petition may be dismissed and there need be no determination of the second principal issue whether or not public

<sup>2</sup> It is pointed out in the *Wilson* case that the Commission may at the threshold of consideration of an issue modification *vel non* of an outstanding license by the proposed operations of another station treat that issue as if on demurrer and thereby avoid the necessity of hearing proof of the truth of allegations of objectionable interference if as a matter of law they do not "show" such interference within the Commission's rules and standards.

It is to be noted that in the *Wilson* case there was before the Commission a question of fact and a question of mixed fact and law. This was because the petition for reconsideration in that case alleged that according to physical data within the Commission's files there would be objectionable interference to the outstanding station by the operation of the applicant (Stanton) station. In court procedure such an allegation would have been subject to a bill of particulars to bring this physical data to the face of the petition and then on demurrer the question of law whether, under the allegations of the petition, including this physical data, objectionable interference was "shown" would have been determined. But nothing equivalent to a bill of particulars appearing to exist in the Commission's practice, it was necessary to rule in the *Wilson* case that there must be a hearing on the petition as to all the questions presented, whether of law, fact, or mixed fact and law. In the instant case the question presented by the Coastal Plains opposition to the petition of WJR for reconsideration is one of law alone.



interest requires indirect modification of the outstanding license: if the allegations of the petition, assuming their truth, do not "show" objectionable interference to the outstanding license within its protected contour their truth is immaterial since not even on the fact of the allegations will there be an indirect modification of the outstanding license within the meaning of the decision of the Supreme Court in the KOA case; hence there will be no need of a hearing under the KOA decision on the issue whether or not the public interest requires such a modification. But if the question of law as to the sufficiency of the allegations to show objectionable interference is answered in the affirmative, then the Commission must determine the question of fact as to the truth of the allegations of the petition (if the applicant station disputes their truth) and in so doing must hold a hearing at which the petitioner—the outstanding station—shall be allowed to introduce evidence of the truth of the allegations and the applicant station evidence to the contrary if it desires. If the facts alleged are found not to be true then again no hearing on the second principal issue which arises in this class of cases, i.e., whether public interest requires the indirect modification of the outstanding license, need be held since the allegations of objectionable interference will not have been proved. But if the facts alleged are found to be true, a hearing on the second principal issue will be requisite under the KOA decision. On all of the foregoing the members of this court are in agreement.

• The principal point of contention in the instant case—and the only point of division within the court as reflected by this opinion and the minority opinion is on the question whether or not the determination of the point of law above described can properly be made without a hearing. In terms of the instant case, can the Commission without a hearing determine whether the allegations of the petition of WJR, assuming their truth, do "show" objectionable interference within WJR's protected contour by the operation of the applicant station, Coastal Plains. It is the contention of the Commission that it can decide that question *ex parte*, i.e., without giving WJR an opportunity to argue orally, an opportunity to try to convince the Commission that the allegations of its petition do, assuming their truth, "show" objectionable interference. In

53. support of this position of the Commission, the minority view in this court is that unless the Commission itself *ex parte* thinks that there is a substantial question as to the sufficiency of the allegations of the petition to show objectionable interference, no hearing on that question need be held. Generalizing the minority view, it is apparently this: Until he has alleged some fact which indicates a threatened damage to or modification of some existing right, or facts which at least present a substantial question in that respect, a person has not established a right to a hearing. It is the

view of the majority that due process of law, as guaranteed by the Fifth Amendment, requires a hearing, including an opportunity to make oral argument, on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite*, for temporary injunctions and the like. A ruling upon a demurrer is obviously not interlocutory for if the demurrer is sustained the pleader's cause (or defense) is dismissed upon the merits; if the demurrer is overruled, the opposite party is put to a trial and the machinery of the tribunal is set in motion.

54 It has been so long taken for granted by courts that the due process clause guarantee of hearing before decision includes hearing upon questions of law as well as upon questions of fact, and it has been so long taken for granted that hearings on questions of law include hearings on such questions arising under demurrers, and the practice of courts to grant such hearings, has been of such long standing; that there is little authority concerning the requirements of due process in these respects. There has been no need for litigants to obtain rulings in support of the right of hearing on questions of law when opportunity to be heard on such questions has not been denied. *Dartmouth College v. Woodward*, 4 Wheat. 518, 581 (U. S. 1819) (Webster's argument), and *Galpin v. Page*, 18 Wall. 350, 368 (U. S. 1873), cited in the *Wilson* case, sufficiently attest that an essential element of due process is an opportunity to be heard before the reaching of a judgment, that judgment without opportunity to be heard is judicial oppression. *Londoner v. Denver*, 210 U. S. 373 (1908), *Morgan v. United States*, 304 U. S. 1 (1938), *Erie R. Co. v. Paterson*, 79 N. J. L. 512, 76 Atl. 1065 (1910), also cited in the *Wilson* case, attest that the due process guarantee of hearing includes an opportunity for argument. Also pertinent are *State v. Milhollan*, 50 N.D. 184, 195 N. W. 292 (1923), and *State v. City of Milwaukee*, 157 Wis. 505, 147 N. W. 50 (1914). In the first of these cases the state of North Dakota on relation of an electric utility company and one of its stockholders sued to enjoin the Board of Railroad Commissioners of North Dakota from proceeding in a rate hearing under the state public utility act. On demurrer to the complaint the point made in behalf of the utility company and its stockholder was that the act permitted the Board to make its own rules and regulations as to procedure, that it could therefore set up such rules as to deny a hearing, and that the act was therefore invalid for denial of due process of law as guaranteed by both the state and Federal constitutions. The court held that the act did not permit the Board to set up such rules of procedure as to deny a hearing. It said: "The word 'hearing' contemplates an opportunity to be heard. That is,



not merely the privilege to be present when the matter is being considered, but the right to present one's contention, and to support the same by proof and argument." (50 N. D. at 196, 195 N. W. at 295) In *State v. City of Milwaukee* the action was on certiorari by the state of Wisconsin on relation of one Arnold, a city assessor, against the city of Milwaukee and others to review certain proceedings of the common council. The relator had been removed from his office as city assessor by proceedings before the common council under charges of having violated the civil service law. Although oral argument had been allowed before a committee of the council, the relator's counsel had by the common council been denied the right to be heard before it, and it was the body vested with the power of removal. The Supreme Court of Wisconsin held that this denial of a right to be heard before the common council vitiated the removal proceeding. In so holding it said:

The repeated refusal of the common council to grant either the written or oral request of the relator to hear his counsel before acting upon the report of the committee stands upon a different basis. There are at least three substantial elements of common-law hearing: (1) The right to seasonably know the charges or claims preferred; (2) the right to meet such charges or claims by competent evidence; and (3) the right to be heard by counsel upon the probative force of the evidence adduced by both sides, and upon the law applicable thereto. If either of these rights are denied a party, he does not have the substantial of a common-law hearing. *Ekern v. McGovern*, 154 Wis. 157, 277, 142 N.W. 595, 46 L. R. A. (N.S.) 796 et seq.; and cases cited. That the word "hearing" includes "oral argument" is expressly ruled by the following cases: *Miller v. Tobin* (C. C.) 18 Fed. 609, 616; *Joseph D. G. Co. v. Hecht*, 120 Fed. 760, 753, 57 C. C. A. 64; *Merritt v. Portchester*, 8 Hun (N. Y.) 40, 45; *Babcock v. Wolf*, 70 Iowa, 676, 679, 28 N. W. 490. See, also, *Akerly v. Vilas*, 24 Wis. 165, 171, 1 L. Am. Rep. 166. Indeed, the idea of the right of a person to be heard by himself or counsel when his property or his personal rights are questioned was so early and firmly imbedded into the groundwork of our jurisprudence that it is difficult to find instances where it has been challenged even in quasi judicial proceedings. The importance and value of such right is considerable in nearly every case. It is the office of counsel to marshal the facts proven to point out their relative importance, and to interpret them in the light of the law applicable thereto. When this is properly done, the judicial mind is enlightened, and is in condition to decide the questions presented with full knowledge of the facts and the law involved. Its importance in the present proceeding is apparent, when it is borne in mind

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that the evidence taken by the committee was very voluminous, was read to the common council at a number of different sessions separated by considerable intervals of time, and was wholly circumstantial in character. The right of the relator either personally or by counsel to argue the evidence and the law to the common council, which body alone had the right to remove, is unquestioned. That the denial of such a right was prejudicial follows from what has been said. Nothing herein contained must be construed to question the right of the body before whom a hearing is had to reasonably limit and control the length of time for oral argument. Limitation exercised in that respect would be judicially interfered with only in case of an obvious abuse of discretion.

The trial court seemed to be of the opinion that, inasmuch as the common council could, by ordinance, prescribe the manner of hearing, it could therefore refuse to *hear oral argument*. In the first place the ordinance is silent upon the question of oral argument before the common council, so it had not by ordinance prescribed a hearing without oral argument. In the second place, *authority to prescribe the manner of a hearing does not include the power to suppress or destroy a substantial constituent element of the hearing itself*. [Italics supplied]. [157 Wis. at 511-2, 147 N. W. at 52-3].

56 In *Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266 (1933), cited in the *Wilson* case, it is held that the quasi-judicial proceedings of an administrative tribunal must satisfy the pertinent demands of due process. We ruled in the *Wilson* case that private as well as public interests are recognized by the Communications Act. As we said there:

While a station license does not under the Act confer an unlimited or indefeasible property right (*Commission v. Sanders Radio Station*, 309 U. S. 470 (1940))—the right is limited in time and quality by the terms of the license and is subject to suspension, modification or revocation in the public interest—nevertheless the right under a license for a definite term to conduct a broadcasting business requiring—as it does—substantial investment is more than a mere privilege or gratuity. A broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury.

We ruled also in the *Wilson* case that the impairment of such a license right by the granting of conflicting facilities to another station is therefore *pro tanto* a deprivation of property and that the due process clause of the Fifth Amendment, providing that no per-



son shall be deprived of life, liberty or property without due process of law, is pertinent. The authorities cited above confirm the proposition that due process includes opportunity to be heard before the reaching of a judgment, including opportunity to make argument; they confirm also that the due process guarantee of hearing, including opportunity for argument, recognizes no distinction between hearing on questions of law and those on questions of fact.

The due process guarantee of hearing in our system of law has always been recognized as a right in persons, not a privilege to be extended to persons according to the *ex parte* judgment of tribunals as to whether or not there should be a hearing. It is a personal right of access to the courts or to administrative tribunals, a right at the minimum to present one's claim of injury or threatened injury and to be heard to argue in support of the proposition that the allegations thereof, assuming their truth, are legally cognizable, i.e., state a "cause of action." This right of hearing accorded by the due process clause is one of the few rights guaranteed by our Constitution which are substantially absolute. The right is subject to no limitation except such requirements as the payment of a filing fee upon presentation of the claim, or of a jury fee in a case involving a jury trial, and such restrictions as are related to the reasonable convenience of the tribunal as to time, place and length of hearing. This right of hearing stems in Magna Charta in the words:

no freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested, and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and *by the law of the land.* [Italics supplied.]

57 The right stems also in recognition of the fact that soundness of decision is promoted by hearings, that tribunals are fallible and need, in order to administer justice according to law, the aid of argument on questions of law and on the meaning of the evidence if the trial of fact issues is reached.

It is of course true that under a system of law that guarantees right of access to judicial and quasi-judicial tribunals as above explained, there will be some abuse of the right. Some claims will be presented which may upon their face appear to be, and which may indeed upon hearing be demonstrated to be, invalid, i.e., to state no "cause of action." But the inconvenience to the tribunal of considering such a claim, i.e., of allowing its presentation and hearing argument in which the complainant has opportunity to try to convince the tribunal that the claim is on its face meritorious, is the unavoidable price of the due process guarantee of hearing. As said by Mr. Justice Brandeis in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-2 (1938): "... Lawsuits ... often prove to

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have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." Paraphrasing this for pertinence to the instant situation, complaints or petitions filed in judicial or quasi-judicial tribunals are often found not to contain allegations legally sufficient for relief. But no way has been discovered of relieving a tribunal and a demurring defendant from the necessity of a hearing in which the complainant shall be given opportunity to try to convince the tribunal by argument that the complaint or petition as drawn is not groundless in law. Under our system of law one is not to be turned out of court on an *ex parte* decision that a claim is not legally cognizable and that one cannot even be heard to argue that it is.

That the due process guarantee of hearing on questions of law and fact means a right in persons, not a mere privilege to be extended to them by tribunals according to their *ex parte* judgment as to whether a hearing should be had, is illustrated in *In re Galvin's Estate*, 153 Misc. 11,274 N. Y. S. 846 (1934), which dealt with the right of both notice and hearing. There an accounting executor was permitted by a surrogate to dispense with service of citation upon a known creditor upon the theory that the latter could gain nothing by appearing and attacking a decree of distribution. This was permitted under a statute providing that under named circumstances service of citation might be dispensed with, or, as the court said, authorizing the entry of an inconclusive decree without the obtaining of jurisdiction in the regular ways. Discountenancing this statute under both the state and Federal constitutions the court used these words:

58 Each of the Constitutions guarantees to the citizen and only to him—not to any court—the privilege of saying whether or not he will be aggrieved by the proposed action of any court. This makes indispensable some preliminary notice, either actual or its presumptive equivalent, before the court acts; but the privilege not having been extended to the court, it cannot presume, or assume beforehand, without notice, what the citizen might or might not do were he notified. From this viewpoint of constitutional law, it is immaterial that in the judgment of the court he could not possibly be aggrieved by its proposed decree. The right is *his and his alone* to be judge of that before any court passes on it. It is a condition precedent to any court acting that the citizen shall have first had preliminary notice in one or other of the traditional forms, and *an opportunity to be heard*. [Italics supplied] [153 Misc. at 13, 274 N. Y. S. at 849.]

In short, the hearing guarantee of the due process clause of the Fifth Amendment accords to every person who claims injury or



threat of injury an unconditional right<sup>3</sup> of access to judicial or quasi-judicial tribunals (according to their appropriate jurisdiction) to the extent at least of being allowed to present his claim and to argue that the allegations thereof if true entitle him as a matter of law to relief—to contend that his claim, assuming the truth of the allegations thereof, states a “cause of action” cognizable under the rules, principles, concepts or standards of law which the tribunal is empowered to apply; and a right, if after argument it is decided that the allegations of the claim do state a “cause of action,” to present proof as to the truth of the allegations, i.e., a right to a trial. The contention of the Commission in the instant case and the view of the minority in this court make this right conditional. Under the view of the minority, opportunity to be heard in argument on the question of the legal sufficiency of the allegations of a claim of injury or threatened injury (in the instant case the claim of threatened injury to WJR by the proposed operation of Coastal Plains) will not be granted except upon the condition that the tribunal to which the claim is presented thinks *ex parte* that there is a substantial question as to whether the allegations thereof are legally sufficient. If to the tribunal, acting *ex parte*, it appears clear upon the face of the claim that it is not sufficient, no argument will be allowed. The claimant will not be permitted to try to convince the tribunal that a “cause of action” is stated. The criterion for determining whether an argument will be allowed is what the tribunal without hearing argument thinks as to the sufficiency of the claim. Right of access to courts and commissions is reduced to the right to file one’s claim—to drop it, so to speak, into the governmental slot. This manner of dealing with the claims of persons who assert injury or threatened injury is in the view of the majority of this court foreign to our system of law.

The majority view may be epitomized as follows: There are in all cases in which the action of a governmental tribunal is invoked by the filing of a complaint or petition two possible questions. One, raised by demurrer or motion to dismiss or, in an administrative proceeding, by some less formally named instrument of like purpose, or by the tribunal’s *sua sponte* treatment of a petition as if under demurrer, is whether or not the allegations of the party invoking the tribunal’s action—assuming the truth of such allegations—

59 state facts which the law recognizes as actionable within the ambit of the remedial powers assigned by the sovereign to the tribunal. This question, one of law, is to be determined by the consideration of legal materials, such as statutes and rules and judicial decisions, to be brought to the attention of the tribunal in the arguments of the parties. If this question of law is raised, and answered in the negative, then the party seeking the tribunal’s

<sup>3</sup> Subject only to such limitation as is above referred to.

action, unless he is allowed to amend and can amend his allegations, is disabled on the merits to proceed further. If, on the other hand, this first question is raised and answered in the affirmative, i.e., by a holding that the allegations, assuming their truth, do state facts which the law recognizes as actionable within the ambit of the tribunal's powers, then the second question arises, usually by so-called traverse or answer or, in an administrative proceeding, by an opposing instrument of less formal name. That question is whether or not the facts alleged by the party invoking the tribunal's action are true. That is a question of fact which is to be determined by a consideration of the evidence to be produced by the parties, by cross-examination of witnesses and by argument as to the meaning and legal effect of the evidence. Guarantee of hearing, whether in the due process clause or in a statute, assures a hearing not ~~only~~ on such a question of fact but also upon the threshold question of law. Unless this is true the guarantee of hearing, unless the judgment of governmental tribunals on questions of law is infallible, is worthless. For if the tribunal errs in its *ex parte* decision on the threshold question of law, then the party invoking the tribunal's aid is disabled to proceed further. He will therefore never reach a hearing on the second question—will never have the opportunity to present evidence in support of his claim of injury. It is of course true that the presentation of legal materials and argument may not persuade the tribunal to a correct decision, but it is the theory of our jurisprudence—and one justified by experience—that a tribunal is less likely to err if it hears the parties and their counsel. It is further the theory of our jurisprudence that for reasons both of fair play and of respect for government, a party claiming injury or threatened injury shall be heard in support of the legal sufficiency of his allegations before decision is made on the question of their sufficiency, and this notwithstanding that it may appear to the tribunal *ex parte* that they are legally insufficient. In no other manner can right of hearing be protected. If the line is drawn elsewhere, as by according, as the minority in this court suggests, power in the tribunal to deny hearing if it is *ex parte* of the view that the allegations of the complaint or petition are legally insufficient, then it is within the power of the tribunal to deny all parties claiming injury or threatened injury access to a governmental tribunal except to the extent of filing a claim.

The authorities relied upon by the minority do not, in the view of the majority of this court, support departure from the established precept of the due process clause and the long established practice thereunder. It would unduly prolong this opinion to discuss each of the cases cited. It will be sufficient here to state and comment upon three of them: In *Beattmont, S. L. & W. Ry. v. United States*, 282 U. S. 74 (1930)—the appellant railroads filed an action before a three-judge Federal district court to set aside an order of the



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60 Interstate Commerce Commission prescribing a division of joint rates between connecting railroads. The Commission and other railroads intervened. The appellants claimed that the division of rates between connecting carriers was such that it amounted to confiscation, i.e., that the share going to the appellants was too small. They asserted in particular that the rates division prescribed was based on average conditions rather than on the effect on each individual railroad. The three-judge court found that the Commission had had before it evidence sufficient to disclose the effect on each railroad of the rates division and it held that the Commission could properly use averages to determine division and that there was nothing in the record to show that the Commission had not considered the effect on each carrier of the rates based on averages. The appellants urged that the division of rates prescribed by the Commission's order would deprive them of their property without due process of law. The Court held that there was nothing in the complaint or in the evidence that showed that the division of rates would not give the appellants enough to cover operating expenses plus a reasonable return and that to invoke the constitutional protection of the due process clause appellants must show that they would be denied just compensation. The Court said:

Appellants claim that the Commission's order, if enforced, will operate to deprive them of their property without due process of law in violation of the Fifth Amendment to the Constitution. It is well-established by the decisions of this court that, in order to invoke such constitutional protection, the facts relied upon to prevent enforcement of rates prescribed by governmental authority must be specifically alleged and from them it must clearly appear that the enforcement of the measure complained of will necessarily deny to the utility the just compensation safeguard to it by the Constitution . . . [282 U. S. at 88].

61 But this case does not rule that the question whether or not such facts are alleged can be determined without a hearing. No such question was involved in the case. It does not appear that a hearing had been denied by the three-judge court on the question whether or not the complaint filed by the appellants alleged facts necessary to raise a constitutional question. The decision of the Supreme Court is therefore neither an express nor an implied ruling that such a hearing can be validly denied. All that the case holds is that a complaint invoking constitutional protection must in order to constitute a foundation for relief allege facts from which it appears that the enforcement of a measure complained of will invade a constitutional right. This proposition the majority in the instant case do not dispute. Every complaint invoking the action

of a tribunal whether under the Constitution, statutes or common law, must allege facts which constitute a "cause of action" recognized by law, otherwise the complaint will be held insufficient if demurred to. But it does not follow from this that dismissal can validly be made without according to the complainant a hearing, i.e., an opportunity to try to convince the tribunal by argument that the facts alleged do state a "cause of action." The *Beaumont* case does not so hold.

*Bourjois, Inc. v. Chapman*, 301 U. S. 183 (1937), involved an appeal from a decree of a three-judge Federal Court dismissing after trial the plaintiff's bill to enjoin as unconstitutional the enforcement of a statute of Maine requiring registration and the issuance of a certificate of registration by the Department of Health and Welfare to manufacturers, proprietors or producers of cosmetics. It appeared that the plaintiff manufactured cosmetics in New York, had no place of business in Maine, did not hold, use, apply, or sell cosmetics within the state of Maine, and that it had not applied for a certificate. Among the plaintiff's customers were some whose places of business were in Maine. Their purchases were made in part on orders given in Maine to travelling salesmen of the plaintiff, but no order so given was binding until approved by the plaintiff in New York. All shipments to Maine customers were made from New York and the sales in Maine were not made in the original packages. The plaintiff announced in the case that it would refuse to apply for a certificate because the registration statute was void under the Federal and state constitutions. The statute was attacked as a violation of the commerce clause and on other grounds including an objection that the power conferred upon the board to grant or deny a certificate was unlimited and that the board had issued no regulations and that neither the statute nor the board had provided for hearing an applicant. The Supreme Court stated that, the plaintiff not having applied for a certificate, it was not to be assumed that if it concluded to do so its application would be refused or that the board would deny any right to which it was entitled. The plaintiff urged further that relief should be granted because the provisions of the statute concerning seizure and forfeiture of unregistered cosmetics violated the constitution of Maine. As to that the Court said:

62 . . . To that claim it is a sufficient answer that if there is a wrongful seizure, it will be of goods belonging to others. For, as the bill and findings reveal, no goods of the plaintiff will ever be liable to seizure, since the plaintiff will have none in Maine. If under this statute the constitutional rights of others are violated by an unlawful seizure and forfeiture, they, and not the plaintiff, must seek the redress. . . . (301 U. S. at 190).



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The case holds merely that unless a plaintiff alleges (and the event of trial shows) that he is affected by the operation of a statute, he cannot attack its constitutionality. The Court does not rule that a plaintiff need not be given an opportunity to argue that he has alleged facts from which it appears that he will be affected by the statute. No question of the right to make such an argument was involved in the case.

In *California Water Service Co. v. Redding*, 304 U. S. 252 (1938), an action was brought by the appellants California Water Service Company and another to enjoin the city of Redding from receiving a grant allotted by the Federal Administrator of Public Works under Title 2 of the National Industrial Recovery Act and supplemental legislation to aid the city in the construction of a municipal water works system, and also to enjoin the city from expending the proceeds of the sale of city bonds (issued under state statutes) for the purpose of constructing such a plant. The bill of complaint filed in a three-judge Federal court alleged that the grant of Federal funds and the legislation said to authorize it were invalid under the Federal Constitution, Articles I (Sections 1, 8 and 9) and II (Sections 1 and 3) and the Tenth Amendment, and also that the grant was in violation of the Federal statutes referred to. The three-judge court decided that the bill of complaint stated no cause of action within its cognizance and dismissed the same. On appeal this was affirmed upon the ground that there was no substantial claim of unconstitutionality of a state statute or administrative order as required in Section 266 of the Judicial Code. More fully, it was held that Section 266, providing for the convening of a three-judge Federal court in an action to restrain the enforcement of a state statute on the ground of the unconstitutionality thereof under the Federal Constitution, does not apply unless a substantial question is presented, and that therefore it is the duty of a district judge to whom an application for an injunction restraining the enforcement of a state statute or order is made to scrutinize the bill of complaint to ascertain whether a substantial Federal question is presented since otherwise the provision for the convening of a court of three judges is not applicable. But the case does not hold that a plaintiff presenting such a bill of complaint can lawfully be denied the right to argue to the judge that his bill does state facts which present a substantial Federal question. The Court said also that when it becomes apparent that a plaintiff has no case for three judges, although they may be properly convened, their action is no longer prescribed. But again the case does not rule that a plaintiff cannot be heard to argue that a court has been properly convened. No such questions as to the right of argument were before the Court.

There are listed in the margin other cases relied upon by the minority.<sup>4</sup> Analysis thereof shows that no more than those above discussed do they support the position of the minority or the position taken by the Commission in the instant case.

It is urged by the minority that the due process clause reads "No person shall . . . be deprived of . . . property, without due process of law" and that one who is not injured, i.e., one who does not allege injury or threatened injury (in terms of the instant case does not allege objectionable interference within the protected contour of the outstanding station), will not be deprived of property and is hence not entitled to a hearing. The fallacy in this argument lies in an ambiguous use of the word "hearing." The word "hearing" thus used can have two meanings. One denotes a hearing on the truth of allegations made by a complainant. In that sense of the word the generalization is correct; there is no division in the court on this. 'No person' is entitled to a trial on the issue of the truth of the facts he alleges unless such facts legally constitute a "cause of action." But the word "hearing" properly denotes also a hearing on the question of law as to the sufficiency of the allegations made by a complainant. In this sense of the word the generalization invalidly asserts that such a question can be decided without a hearing, i.e., without allowing the complainant an opportunity to argue to the tribunal to which his complaint is presented that the allegations of the complaint, assuming their truth, are as a matter of law sufficient. The assertion is invalid because the due process clause guarantee of hearing extends, as demonstrated above, to questions of law as well as to those of fact, and because the guarantee of hearing, as also demonstrated above, is not conditional upon the *ex parte* view of the tribunal as to whether there is a substantial question as to the sufficiency of the allegations of a complainant.

WJR as an outstanding licensee is not a mere permissive intervener or, as the minority puts it, an "outsider." Under Section 312(b) of the Communications Act and the ruling of the Supreme Court in the KOA case, if the license of WJR as an outstanding station will suffer indirect modification by the operation of the

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<sup>4</sup> *Denver Stock Yard Co. v. United States*, 304 U. S. 470 (1938); *Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249 (1931); *Aetna Insurance Co. v. Hyde*, 275 U. S. 440 (1928); *Lampasas v. Bell*, 180 U. S. 276 (1901); *Western Union Tel. Co. v. Ann Arbor R'd Co.*, 178 U. S. 239 (1900); *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199 (1878); *Clark v. Kansas City*, 176 U. S. 114 (1900); *Tennessee Power Co. v. T.V.A.*, 306 U. S. 118 (1939); *Chicago Board of Trade v. Olsen*, 262 U. S. 1 (1923); *Electric Bond Co. v. Commission*, 303 U. S. 419 (1938); *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *Jameson & Co. v. Morgenthau*, 307 U. S. 171 (1939).



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applicant station, Coastal Plains, WJR is entitled to a hearing on the question whether or not such modification is required by the public interest; and under the ruling of this court in the *Wilson* case it is entitled first to a hearing on the issue modification  
64 *vel non* itself and therefore, as above explained, at the threshold to a hearing on the question raised, as if on demurrer, whether or not the allegations of its petition for reconsideration show that there will be an indirect modification of its license by the operation of Coastal Plains.

It is not, as asserted in the minority opinion, the contention of the majority that the Constitution requires oral argument in order that a pleader may have a chance to persuade the tribunal that he has an interest "despite" his allegations. On the contrary, the position of the majority is, as above stated, that every person who claims injury or threat of injury has a right to contend before an appropriate tribunal that "within" the allegations of his claim, assuming their truth, he states a "cause of action" cognizable under the rules, principles, concepts or standards of law which the tribunal is empowered to apply.

We conclude that under the due process clause of the Fifth Amendment WJR is entitled to a hearing before the Commission as to the sufficiency of the allegations of its petition for reconsideration, assuming their truth, to show indirect modification of its license by the granting of the Coastal Plains application.

### III

It is, however, contended by the Commission that even if it erred in denying to WJR an opportunity to be heard on the question whether or not the allegations of its petition for reconsideration, assuming their truth, "showed" objectionable interference to WJR within its lawfully protected contour by the operation of Coastal Plains, and consequent indirect modification of WJR's license, nevertheless the decision reached by the Commission as to the sufficiency of the allegations of WJR's petition was correct and that this court can so determine. This contention of the Commission is not supportable—this court cannot now so determine. The contention that it can omits to recognize the distinction between questions of correct procedural action and questions of correct decision on the merits.

Whether the Commission was under a duty to accord a hearing, i.e., to hear argument before deciding whether the allegations of WJR's petition were sufficient is a procedural question quite separate from the question on the merits whether or not the allegations of the petition, assuming their truth, were sufficient. If it was the duty of the Commission to accord the hearing, to hear argument, on the question of the sufficiency of the allegations of the petition

before deciding as to their sufficiency, then the question of the correctness of its decision as to their sufficiency is not properly before this court. The Commission's decision has not been validly reached and until it has been validly reached it is not properly reviewable. As this court ruled in the *Wilson* case, the statutory scheme set up in the Communications Act contemplates, before review in this court, proper exercise of the Commission's primary jurisdiction, i.e., valid first instance hearings properly conducted from the procedural—due process—standpoint. The court, 65 in the view of the majority, must therefore remand the case with directions to the Commission to allow a hearing to WJR. Then if after hearing the Commission decides that the allegations were insufficient and dismisses the petition (i.e., allows the grant of the Coastal Plains application to stand) an appeal to this court will bring properly before us the question of the correctness of the Commission's decision on the merits as to the sufficiency of the allegations to show indirect modification of the license of WJR as an outstanding station by the operation of Coastal Plains.

For the court to hold that the Commission was under a procedural duty to hear argument on the merits before deciding on the merits, but nevertheless to review the Commission's decision on the merits and either affirm or reverse it, would be for the court to condone the denial of hearing, the refusal to hear argument. Denial of a procedural right guaranteed by the Constitution—in this instance denial of a hearing guaranteed by the due process clause—is never "harmless error."

An example of this may be supplied from criminal proceedings. Suppose that a verdict of guilt of murder and a sentence imposed under such verdict were appealed on a record which included the evidence, exhibits, arguments to the jury, and instructions, that is to say, all items conventionally necessary for review on the merits. But suppose that the contention of the appellant is that he was excluded from the courtroom during the trial, and that this was a denial of a procedural right guaranteed by the Constitution. Suppose that the Government conceded that the appellant was excluded from the courtroom during the trial but contended first that the Constitution did not require his presence (just as the Commission contends here that the Constitution does not guarantee a hearing) and second that, in any event, the verdict of guilt was correct under the evidence and the instructions. If the court decided that the exclusion of the appellant from the courtroom was a procedural error, a violation of a constitutional guarantee (this of course the court would be obliged to decide), the court would decline to consider the question of the correctness of the verdict under the evidence and the charge and would remand the case for a new trial.



with directions that the appellant should be allowed to remain in the courtroom during the trial. No matter how clear it might appear under the evidence that the appellant was "guilty" the court would be obliged to hold the verdict and sentence vitiated by the exclusion of the appellant from the courtroom. The court would recognize that there can be no validly "correct" verdict, no valid "guilt," until there has been a trial conducted in accordance with fundamental procedural guarantees. By parity of reasoning: In the instant case, since the due process clause does guarantee to WJR a right to make argument to the Commission in support of the sufficiency of the allegations of its petition for reconsideration before the Commission decides the question of their sufficiency, then since the Commission denied that right of argument this court must decline to consider the question of the "correctness" of its decision as to the sufficiency of the allegations until the Commission on remand has accorded WJR the right to make argument, and thereafter has reached a decision as to the sufficiency of the

66 allegations. Only then will there be a valid first instance decision by the Commission which can properly be reviewed on the merits in this court. The court must recognize that there can be no valid "insufficiency of allegations" until there has been a decision as to their sufficiency reached in a manner consistent with fundamental procedural guarantees. There can be no "correct" decision on the merits which the court can review until a decision has been properly reached in view of the procedural guarantee of hearing.

The foregoing is epitomized in the *Wilson* case in the concluding aphorism: "He who decides anything, one party being unheard, though he should decide right, does wrong."

The Commission contends further that even if it did commit procedural error in denying hearing the case need not be remanded for hearing; that a hearing can be afforded in this court on the sufficiency of the allegations of WJR's petition. This contention is not supportable. It again ignores that the statutory scheme contemplates a procedurally valid first instance hearing in the administrative tribunal before review. As this court said in the *Wilson* case:

The contention of the Commission that it could properly decide the issue before it without a hearing, leaving any hearing to an appeal, ignores the respective positions and functions of the Commission and this court in the statutory scheme for administration of the Act. It is true that this court has power under Section 402(e) to rule on questions of law. But its rulings are in review, not in the first instance. The Commission is first, in the exercise of its primary jurisdiction, to apply its expertise and make a "full statement in writing of the facts and grounds for its decision as found and given by it

" (Section 402(e)). Administrative tribunals must, in the nature of their functioning, make decisions on questions of law in the first instance. They cannot reach decisions without applying to the facts they find the law governing their action; and to apply the law they must first determine what it is. Cf. *United States v. Louisville & N. R. R.*, 235 U. S. 314, 320-21 (1914); *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 136 (1939); 1 Vom Baur, *Federal Administrative Law* § 73 (1942). Nothing in the Communications Act or in any judicial construction thereof of which we are aware indicates that it was the intention of Congress that the Commission should exercise its primary jurisdiction on questions of fact only, and not on mixed questions of fact and law or questions of law alone. We think the Act, rightly viewed, contemplates hearings by the Commission in the first instance on all such questions.

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## IV

It is contended by the Commission that WJR did not in the instant case in its petition for reconsideration request a hearing on the question whether or not its petition alleged facts which if true "show" that it will suffer objectionable interference within its protected contour by the operation of the Coastal Plains station and that this forecloses WJR's right to such a hearing. It is true that the prayer does not specifically request such a hearing. The prayer is: "Wherefore, the petitioner requests the Commission to reconsider its action of August 22, 1946, and to designate the Tarboro Broadcasting Company [Coastal Plains] application for hearing or, in the alternative, to hold in abeyance its grant of such application until after a decision in the *Clear Channel* case." But if WJR's request for hearing is too broad, i.e., if, as the Commission appears to contend, WJR is asking for an immediate hearing on the question whether public interest requires operation of the Coastal Plains station at the cost of indirect modification of WJR's license before determination of the question whether or not the allegations of WJR's petition, assuming their truth, "show" indirect modification of WJR's license, the Commission is at liberty, as this court ruled in the *Wilson* case, to hold a hearing first on the issue modification *vel non*, and at the threshold of consideration of that issue to treat WJR's petition as if on demurrer. In view of the broad powers of the Commission for orderly procedure, including its power to deal with WJR's petition for reconsideration first, as if on demurrer, it ought not decline to do so upon the ground that the prayer of the petition was phrased too broadly: it ought not on such ground deny WJR a hearing on the very question which it, the Commission, actually ruled on and decided in the negative *ex parte*, to wit, the question whether or not the



allegations of the petition, assuming their truth, showed that WJR's license would be indirectly modified by the operation of the Coastal Plains station. It would be technical indeed for the Commission to refuse a hearing on that question merely upon the ground that the prayer of the petition improperly requested a broader hearing. It is not contemplated by the Communications Act—especially in view of the liberal procedure permitted thereunder—that the Commission shall deal so strictly with litigants before it. Not even a court would be justified in taking so technical a position as this.

The decision of the Commission of August 22, 1946, granting without hearing the application of the Coastal Plains Broadcasting Company, Inc., for a construction permit to erect a new standard broadcast station and the decision and order of the Commission of December 17, 1946, denying without hearing the appellant's petition for reconsideration of the Commission's decision of August 22, 1946, are reversed and the case is remanded for further proceedings in accordance with this opinion.

*Reversed and remanded.*

68 PRETTYMAN, J., with whom EDGERTON, J., concurs, *dissenting*:

The opinion of the court states our difference of view. The ruling is that a petitioner for intervention in an administrative proceeding is entitled to an oral hearing as a matter of constitutional right, no matter what or how little he says in his petition. It is my view that a petition for intervention can be denied without a hearing, if the petitioner does not allege any fact which indicates a threatened damage to, or modification of, some existing right of his, or a fact which at least presents a substantial question in that regard.

Perhaps some preliminary observations will serve to clarify the issue. The opinion of the court describes WJR's petition to the Commission as one for reconsideration of the decision in the *Coastal Plains* case. That is true; it was. But it was basically a petition to intervene as it asked that WJR be made a party to the Coastal Plains proceeding.<sup>5</sup> And that intervention was a necessary prerequisite to those portions of the petition which prayed for the hearing on the Coastal Plains application. What we are really considering is the petition to intervene. The question is: Does the Constitution require that WJR have an oral hearing upon its

<sup>5</sup> Technically, under the Rules and Regulations of the Federal Communications Commission, Part 1, relating to organization and practice and procedure, this appellant's petition was for rehearing under § 1.390, rather than to intervene under § 1.388. But in effect it was a petition to intervene. The status of such a station was held to be that of an intervener in *Federal Communications Comm'n v. National Broadcasting Co.*, 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035 (1943).

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prayer to be made a party to the Coastal Plains case? In its present opinion, the court declines to consider that portion of the petition which prays for reconsideration of the Commission's decision granting the Coastal Plains application.

The opinion discusses the right of access to the Commission. As I see it, that is not involved. WJR had such access. It filed its petition—in such form as it wished and with a supporting affidavit—and the petition was considered and disposed of by a long opinion. The point in controversy here is whether that right of access necessarily includes an oral hearing.

The court says that a petitioner is entitled to hearing upon questions of law. I do not dispute that proposition. But I say that a question of law must be presented before there need be a hearing upon it, and that questions of law are presented only upon allegations of fact. Such questions do not exist *in vacuo* in judicial or quasi-judicial proceedings. The mere assertion of an abstract proposition of law does not constitute a justiciable issue. The key to the present controversy is whether facts must be alleged in sufficient quality and quantity to present a question of law.

69 The court says that if no oral hearing be had upon a petition to intervene, the petitioner is "disabled to proceed further" and thus is left to the premise of infallibility on the part of the Commission. I do not agree with that view. Such a petitioner has an appeal just as if he had had a hearing, and if his allegations of fact are sufficient, in the view of the appellate court, to present a question as to his rights, the court will so hold. If the reply to this view be that the Constitution does not guarantee an appeal, then I say that the Constitution leaves petitioners to the peril of fallibility of the Commission, hearing or no hearing. Moreover, the Commission is an executive agency, and its actions must under the Constitution be subject to judicial scrutiny for constitutional validity.

One more preliminary observation should be made. We are not discussing the desirability of a hearing. We are concerned only with whether a hearing was required. Courts are without power to require a hearing in an administrative proceeding unless a hearing is required by the constitution, a statute, a valid administrative regulation, or a binding contractual agreement. No matter how desirable a hearing may be in the premises, or how greatly a hearing might facilitate sound disposition of a controversy, the courts cannot compel it, unless there be some requirement for it other than the court's own view. The courts cannot require an administrative agency to do that which is merely patently desirable. They can require only that the agency comply with the Constitution, the statutes, and its legal obligations.



Because the question principally at issue is of such vast practical importance in both administrative and judicial proceedings, I state my view upon it at somewhat greater length than might otherwise be justified.

Appellant's station, WJR, is a Class I-A "clear channel" station. Its rights are only those contained in its license. The statute itself is explicit in providing that no license "shall be construed to create any right, beyond the terms, conditions, and periods of the license." The Supreme Court has given effect to rights of an existing licensee in respect to changes, whether nominal or actual, in the terms of its license<sup>6</sup>; but the Court has not suggested that the rights of a licensee are greater than the terms of his license.

70 The status and rights of a Class I-A clear channel station are described and defined in the Commission's Rules and Regulations and in its "Standards of Good Engineering Practice"<sup>7</sup>. Its nighttime rights and its daytime rights are wholly different. At nighttime a Class I-A clear channel station is given absolute protection; that is, no other station is permitted to broadcast on its frequency at night. But the Rules are just as clear that in the daytime, other stations can be assigned to that frequency.<sup>8</sup> The rights of a Class I-A station in daytime are defined with precision: "during daytime the Class I station is protected to the 100 uv/m ground wave contour."<sup>9</sup> The area thus defined is called the normally protected contour or area.

This concept of normal protection in the daytime is clear. The circumference of the protected area is a contour line, which is fixed by measurement of the strength of the radio waves from the particular station. That strength, or intensity, is measured in terms of microvolts (millionths of a volt) or millivolts (thousandths of a volt) per meter, abbreviated as uv/m and mv/m, respectively. The wave which is measured is the groundwave, which follows the surface of the earth and extends greater or less distances depending upon the nature of the earth, its topography, and such obstacles as noise and steel structures. Generally speaking, the greater the distance from the station, the less the strength of the station signal.

<sup>6</sup> *Federal Communications Comm'n v. National Broadcasting Co.*, *supra* note 1.

<sup>7</sup> Standards of Good Engineering Practice concerning Standard Broadcast Stations, revised to June 1, 1944 (hereinafter referred to as "Standards"). These contain detailed statements relative to broadcasting standards and are auxiliary to the Commission's Rules. Some portions of the Rules expressly refer to the Standards and, seemingly, they are accorded the force and effect of the main body of the Rules, to that extent at least. The parties before us are in agreement in so treating them.

<sup>8</sup> Standards, pp. 1-2.

<sup>9</sup> *Ibid.*

12  
The "100 uv/m ground wave contour" named in the Commission's Standards is the imaginary line which connects all points at which the ground wave of the station is of 100 microvolts per meter strength. The area within that irregular circumference is the normally protected area.

The Standards also prescribe conditions under which a station may have protection outside and beyond the area which is normally protected. They provide that when it is shown that "primary service" is rendered by a station beyond the normally protected contour, and that primary service to approximately 90 per cent of the population in that area is not supplied by another station, "the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration."<sup>10</sup> Thus every station has normal protection, and those which comply with the prescribed requirements may secure such additional protection as the individual merits of their cases justify.

Obviously, this additional protection would be upon specific application, showing, finding and award.

71 WJR had normal protection and no more. Its license contained no special provision as to protection. It does not allege that it ever applied to the Commission for additional protection based upon the individual merits of its case, as provided in the permissive sections of the Standards. The daytime protection afforded by its license was to its 100 uv/m groundwave contour, and no further.

In its petition to the Commission, WJR said that its present interference-free service area would be subjected to objectionable interference by the Coastal Plains station, and referred to an attached engineer's affidavit for details. The engineer recited that he had made calculations of the relative field intensities of the two stations, and assumed that interference would be objectionable when the field intensity of the Coastal Plains station, exceeded 10 per cent of the time, was 5 per cent or more of the average measured field intensity of WJR, which calculations are in accord with the Commission's standards. These calculations showed, the engineer stated, that the service of WJR would be so interfered with between 10 A.M. and 2 P.M. in an area in which the field intensity of that station averages 32 microvolts per meter or less during daytime hours. Thus WJR did not allege to the Commission that the Coastal Plains operation would cause daytime interference with its signals or service within its 100 uv/m groundwave contour. Its engineer's affidavit was quite explicit that the interference from Coastal Plains would occur in areas where WJR's average signal strength was only 32 uv/m, which is well outside the 100 uv/m contour. So the facts alleged in the petition for intervention and

<sup>10</sup> *Id.*, p. 4.



hearing as presented to the Commission, taken as fully true, do not show any threatened interference in the only area in which WJR is protected.

72. WJR also alleged in its petition to the Commission that "The substantial number of listeners now depending upon WJR service in this area will be deprived of such service through the operation of the proposed Tarboro (Coastal Plains) station." The engineer's affidavit contained no such statement and no factual basis for it. The extreme of the engineer's conclusions was that the Coastal Plains signal would exceed 5 per cent of the WJR signal in the described area for more than 10 per cent of the time. The petition does not allege any facts which indicate a threat to any of WJR's present property or license rights.

As I have said, it is my view that a person has not established his right to a hearing under the Fifth Amendment, under the Communications Act, or under the Commission's Rules and Regulations, until he has alleged some fact which indicates a threatened damage to, or modification of, some existing right of his; or facts which at least present a substantial question in that regard<sup>11</sup>. If a person has a right of protection within a 100 uv/m contour, and he alleges that a contemplated new operation will interfere with him at his 32 uv/m contour, he has not alleged that he would be deprived of property by the new operation, or that his license would be modified by it. He has not alleged, factually, that he is entitled to be heard upon the newcomer's application.

I think that the applicable rule is stated in *Beaumont, S. L. & W. Ry. v. United States*,<sup>12</sup> where the Supreme Court said:

"Appellants claim that the Commission's order, if enforced, will operate to deprive them of their property without due process of law in violation of the Fifth Amendment to the Constitution.

"It is well-established by the decisions of this court that, in order to invoke such constitutional protection, the facts relied upon to prevent enforcement of rates prescribed by governmental authority must be specifically alleged and from them it must clearly appear that the enforcement of the measure

<sup>11</sup> Some phases of this problem are discussed in the several opinions in *National Broadcasting Co. v. Federal Communications Comm'n*, 76 U. S. App. D. C. 238, 132 F. 2d 545 (1942), aff'd, 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035 (1943). In that case it was undisputed that the new operation by WHDH would cause objectionable interference to KOA's service in violation of its license, since the new operation was to be at night, when KOA, as a Class I station, was fully protected. KOA so alleged in its petition to intervene.

<sup>12</sup> 282 U. S. 74, 88, 75 L. Ed. 221, 51 S. Ct. 1 (1930).

73 complained of will necessarily deny to the utility the just compensation safeguarded to it by the Constitution."<sup>13</sup>

The due process of law protective provision of the Constitution, like any other man-made law, must be invoked by an allegation of facts. In our jurisprudence a plaintiff must state a factual cause of action. Even the new Federal Rules of Civil Procedure require that the statement of the claim must show that the pleader is entitled to relief.<sup>14</sup> Neither a blank sheet of paper nor a mere naked assertion of a legal proposition depicts a legal right in a certain person in a certain case or presents a justiciable controversy. Not every assertion, by a pleader, of lack of due process poses a constitutional question.<sup>15</sup>

Parenthetically I note that an oral argument upon its prayer for intervention is not the hearing which WJR requests. It did not ask, and does not now ask,<sup>16</sup> that its prayer to be made a party be set down for argument before the Commission. Its request is that the Coastal Plains application be set down for hearing. The court is not proposing to grant that request, or even to act upon it.

We have no difference of opinion upon the proposition that if the facts as alleged clearly show that the person making the allega-

<sup>13</sup> See also *Denver Stock Yard Co. v. United States*, 304 U. S. 470, 484, 485, 82 L. Ed. 1469, 58 S. Ct. 990 (1938); *Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249, 254, 255, 75 L. Ed. 1010, 51 S. Ct. 458 (1931); *Aetna Insurance Co. v. Hyde*, 275 U. S. 440, 446, 447, 72 L. Ed. 357, 48 S. Ct. 174 (1928); *Lampasas v. Bell*, 180 U. S. 276, 283, 45 L. Ed. 527, 530, 21 S. Ct. 368 (1901); *Western Union Telegraph Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 243, 244, 44 L. Ed. 1052, 1054, 20 S. Ct. 867 (1900); *Gold Washing and Water Co. v. Keyes*, 96 U. S. 199, 203, 24 L. Ed. 656, 658, 659 (1878). Cf. *Clark v. Kansas City*, 176 U. S. 114, 118, 44 L. Ed. 392, 397, 20 S. Ct. 284 (1900): "Not a law alone, but a law and its incidence, are necessary to justiciable right or injury; . . ."

<sup>14</sup> Fed. R. Civ. P., 8 (a).

<sup>15</sup> One not affected may not raise a constitutional question. *Tennessee Power Co. v. T.V.A.*, 306 U. S. 118, 83 L. Ed. 543, 59 S. Ct. 366 (1939); *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 42, 67 L. Ed. 839, 43 S. Ct. 470 (1923); and many other cases to the point collected in the digests, treatises and restatements. As to speculative inquiries in hypothetical controversies, see *Electric Bond Co. v. Securities and Exchange Comm'n*, 303 U. S. 419, 443, 82 L. Ed. 936, 58 S. Ct. 678 (1938); *Bourjois, Inc. v. Chapman*, 301 U. S. 183, 188, 81 L. Ed. 1027, 57 S. Ct. 691 (1937); *Massachusetts v. Mellon*, 262 U. S. 447, 484, 488, 67 L. Ed. 1078, 43 S. Ct. 597 (1923).

<sup>16</sup> Appellant "prays an order reversing said decisions (the original grant of the Coastal Plains application on August 22, 1946; the grant of a modified Coastal Plains application on October 14, 1946; and the denial of appellant's petition on December 17, 1946) of the Federal Communications Commission and for such further relief as this court may deem just and proper."



73 65  
tions has an interest in the proceeding (i.e., that a legal right of his is involved), he cannot be denied participation in the proceeding without an opportunity to prove the facts; if he proves his facts, he is entitled to participate in the proceeding from then on. And we agree that if, upon the acts as alleged, a real and substantial question of law arises as to whether he has an interest in the matter, due process of law requires that he be heard on the question of law. A real and substantial threat of injury is sufficient to invoke the protective clause.

74. Of course, the difference between what is and what is not a substantial question of law is often difficult to decide. But our practice has many instances in which it must be decided. Rule 61 of the Federal Rules of Civil Procedure and Rule 52(a) of the Federal Rules of Criminal Procedure, dealing with error not affecting "substantial rights" are two. Rule 46(a) of the Criminal Rules, dealing with bail pending appeal when "a substantial question" is presented, is another. What is "substantial evidence" is still another. Perhaps the necessity for a "substantial" federal constitutional question as a prerequisite to the convening of a three-judge court<sup>17</sup> is the most vivid illustration.

The court relies upon an analogy to a demurrer, and extends its ruling to cover motions to dismiss, which are the new substitutes for demurrers. I doubt that the analogy is complete, this being a petition to intervene in an administrative proceeding; but, apart from that consideration, I do not believe that the Constitution unequivocally and in all events requires a hearing upon a demurrer. It is my view that if a complaint fails to allege facts which even pose a substantial question whether the complainant is entitled to relief, the court can dismiss it without hearing. The Rules of Civil Procedure having abolished demurrers and substituted therefor motions, provide:<sup>18</sup>

"To expedite its business, the court may make provision by rules or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition."

The ruling of the court in this case would make that rule invalid when applied to motions to dismiss. I do not think it is invalid.

Moreover, the local rules of court in this jurisdiction provide for

<sup>17</sup> Act of Aug. 24, 1937, 50 Stat. 752, 28 U.S.C.A. § 380a (Supp. 1946). *California Water Service Co. v. Redding*, 304 U. S. 252, 82 L. Ed. 1323, 58 S. Ct. 865 (1938); *Jameson & Co. v. Morgenthau*, 307 U. S. 171, 83 L. Ed. 1189, 59 S. Ct. 804 (1939).

<sup>18</sup> Fed. R. Civ. P., 78.

65 76  
an oral argument of ten minutes on motions.<sup>19</sup> If that oral argument were designed to fulfill constitutional requirements, it could not be limited to ten minutes. A rule designed to meet constitutional requirements, and effective to that purpose, would have to be phrased in terms of adequacy of presentation. In my view, the local ten-minute rule on motions is a rule of court convenience and has no basis in constitutional necessities.

75 The decision of the court that the Constitution requires an oral hearing on all petitions for intervention would cause extensive revision of the rules of administrative agencies. I have examined many of those rules and find no indication of any thought that such petitions must necessarily be set for oral hearing. The fact that they make no such provision is, of course, unimportant if they are constitutionally inaccurate in that respect. But it is an interesting circumstance that the requirement is not generally, if at all, recognized. All those rules will have to be revised under the opinion and decision of the court in the present case.

The foregoing observations in respect to the Fifth Amendment apply also to the contention that the Communications Act requires that WJR be given a hearing. The Act<sup>20</sup> requires a hearing before an existing license can be modified, a licensed facility changed, or an application for modification of a license denied. A license is not being modified unless one of its terms is being changed, encroached upon or threatened in some way. If none of the rights conferred by the license is being impinged upon, I find no statutory right to a hearing.

The point upon which we differ is elusive and difficult to pin down, but it is exceedingly simple. Perhaps if we visualize a proceeding we will make it clear. A case to which A and B are parties is pending before some tribunal. An outsider, M, appears and files a paper in which he asks to be made a party.<sup>21</sup> But he does not allege any fact which shows that he has any interest in the case, or that he would be affected by it, or even raises any substantial question in that respect. My view is that such an unsupported request can be denied without an oral argument. The court says

<sup>19</sup> Rule 9 (b) of the Rules of the District Court of the United States for the District of Columbia.

<sup>20</sup> Secs. 312(b), 303(f), 309(a).

<sup>21</sup> The court says that WJR was not an "outsider" to this proceeding. Certainly it was not a party, and it certainly had no right to be a party unless its license rights were threatened. Absent such threat, it was as much an outsider to the proceeding as if it had no broadcasting license. It seems to me that the Supreme Court was quite meticulous in making this clear by its discussion of the converse situation in the *National Broadcasting Co.* case, *supra*, note 1.



that the Constitution requires that he have oral argument, in order that he may have a chance to persuade the tribunal that he has an interest despite his allegations. In its practical effect, the court requires that every petition for intervention be set for oral hearing, no matter what the petition says or fails to say. I say that tribunals have some measure of leeway to dispose of such petitions without hearing, if they do not even raise a substantial question as to the petitioner's interest. In its theoretical concept, the court seems to hold that the Constitution protects all pleaders against stupidity, laziness or ineptness with the written word. My view is that the Constitution requires him who wants to participate in a pending case to exert at least a modicum of effort and to indicate in writing at least some shadow of factual ground for his prayer.

76 The court does not reach the merits of WJR's petition:

It is my view that it should proceed to consider whether the Commission was right or wrong in denying the intervention. The error, if there was any, on the part of the Commission was in holding that WJR was not entitled to participate in the proceeding. The error was not, in my view, in merely so deciding upon the written petition without oral argument.

77 United States Court of Appeals, for the District of Columbia Circuit

October Term, 1948

No. 9464

WJR, THE GOODWILL STATION, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE;

COASTAL PLAINS BROADCASTING COMPANY, INC., INTERVENER

Filed Oct. 7, 1948. Joseph W. Stewart, Clerk.

Appeals from the Federal Communications Commission

Before: STEPHENS, EDGERTON, CLARK, WILBUR K. MILLER and  
PRETTYMAN, JJ.

*Judgment*

This cause came on to be heard on the transcript of the record from the Federal Communications Commission, and was reargued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the decision of the said Federal Communications Commission appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to

the said Federal Communications Commission for further proceedings in accordance with the opinion of this Court.

Per Chief Judge STEPHENS.

Dated October 7, 1948.

Dissenting opinion by Circuit Judge Prettyman, in which Circuit Judge Edgerton concurs.

78 In the United States Court of Appeals for the District of  
Columbia Circuit

No. 9464

WJR, THE GOODWILL STATION, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE;

COASTAL PLAINS BROADCASTING COMPANY, INC., INTERVENER

Filed Dec. 15, 1948. Joseph W. Stewart, Clerk.

*Designation of Record*

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Copy of copy of letter from Clerk to counsel, dated May 22, 1947, with respect to reargument, as amended by letter dated May 27, 1947.
3. Opinion of the United States Court of Appeals for the District of Columbia.
4. Judgment of the United States Court of Appeals for the District of Columbia.
5. Designation of record.
6. Clerk's certificate.

PHILIP B. PERLMAN,  
Solicitor General of the  
United States of America.

HARRY M. PLOTKIN,  
Acting General Counsel,

Federal Communications Commission,

MAX GOLDMAN,

Acting Assistant General Counsel,  
Federal Communications Commission,



*Acknowledgment of Service*

Receipt of a true copy of Appellant's "Designation of Record" is hereby acknowledged this 14th day of December, 1948.

KELLEY E. GRIFFITH,  
*Counsel for Appellant,*  
FRANK U. FLETCHER,  
*Counsel for Intervener.*

80 United States Court of Appeals for the District of Columbia  
Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered 1 to 74, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals as designated by counsel in the case of: WJR. The Goodwill Station, Inc., Appellant, v. Federal Communications Commission, Appellee; No. 9464.—October Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twenty-fourth day of December, A.D. 1948.

JOSEPH W. STEWART,  
*Clerk of the United States Court of Appeals for the  
District of Columbia Circuit. (Seal.)*

80

Supreme Court of the United States

No. 495, October Term, 1948

*Order allowing certiorari*

Filed February 28, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy took no part in the consideration or decision of this application.

81

In the Supreme Court of the United States

October Term 1948

No. 495

*Stipulation as to printed record*

Filed March 17, 1949

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the consideration of this case on the writ of certiorari to the United States Court of Appeals, District of Columbia Circuit, granted February 28, 1949, the printed record may consist of the record as designated on the petition for writ of certiorari and the following additional material:

Table 15-8, page 181 of the record.

Table 17-8, page 182 of the record.

Table 16-8, page 183 of the record.

Figure 4-1, page 184 of the record.

Figure 12-3, page 185 of the record.



72 FCC VS. WJR, THE GOODWILL STATION, INC., ET AL.

It is further agreed that in briefs for the respective parties, reference may be made to any portion of the transcript of record which is not included in the printed record as aforesaid.

Philip B. Perlman

PHILIP B. PERLMAN,

*Solicitor General of the United States of America.*

Harry M. Plotkin

HARRY M. PLOTKIN,

*Acting General Counsel, Federal Communications Comm.*

Max Goldman,

MAX GOLDMAN,

*Asst. General Counsel, Federal Communications Comm.*

DONALD C. BEELAR,

*Counsel for Respondent.*

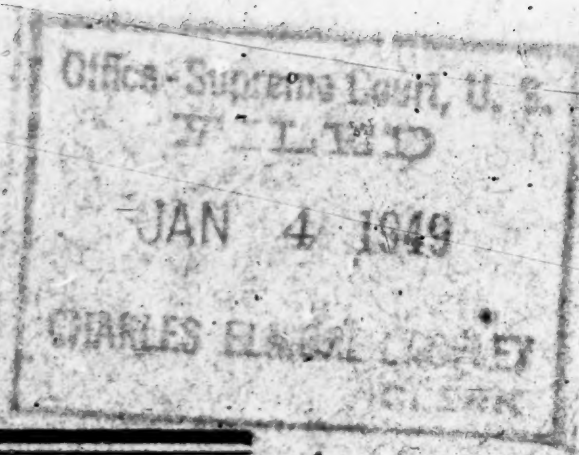
FRANK U. FLETCHER,

*Counsel for Coastal Plains Broadcasting Company, Inc.*

Dated March 16, 1949.

[File endorsement omitted.]

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SUPREME COURT, U. S.



NO. 495

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**In the Supreme Court of the United States**

OCTOBER TERM, 1948

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

WJR, THE GOODWILL STATION, INC., AND COASTAL  
PLAINS BROADCASTING CO., INC., *Intervenor-  
Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA CIRCUIT



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# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 495.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

WJR, THE GOODWILL STATION, INC., AND COASTAL  
PLAINS BROADCASTING CO., INC., *Intervenor-  
Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Communications Commission, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on October 7, 1948, reversing an order of the Commission which denied the respondent's petition for reconsideration of the grant of the application of Coastal Plains Broadcasting Company for a construction permit to erect a new radio station.

### OPINIONS BELOW

The decision and order of the Federal Communications Commission have not yet been reported (R. 35-37). The opinions of the United States Court of Appeals for the District of Columbia Circuit have not yet been reported (R. 48-77).

### JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1948 (R. 77-78). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

### QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment requires the Federal Communications Commission to hear oral argument before it can refuse a request for Commission action when the moving pleading neither states facts nor raises any substantial question of law, which, when viewed in the most favorable light, would make Commission action appropriate.

### STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.* (hereinafter referred to as the "Communications Act") are printed in the Appendix, *infra*, pp. 15-20.

### STATEMENT

On May 28, 1946, Coastal Plains Broadcasting Company, Inc. (formerly Tarboro Broadcasting



Company, Inc.) filed an application for a construction permit for a new standard broadcast station (WCPS) to be located in Tarboro, North Carolina, and to operate on the frequency 760 kilocycles with 1 kilowatt power during the daytime hours only (R. 19-20). This application was consistent with Section 3.22 and 3.25(a) of the Commission's Rules and Regulations (4 F. R. 2715-2716; 5 F. R. 3670; 6 F. R. 2544) (see Appendix, *infra*, pp. 24, 25) authorizing the licensing of Class II stations operating daytime only on Class I or clear channels, among them the frequency 760 kilocycles. The Commission, upon examination of the application of Coastal Plains, on August 22, 1946, granted that application without hearing in accordance with Section 309(a) of the Communications Act and Section 1.382 (formerly Section 1.381) of the Commission's Rules (R. 20). 11 F. R. 891, 177A-416, 13 F. R. 660, see Appendix *infra*, pp. 17-18, 20-21.

On September 10, 1946, WJR, The Goodwill Station, Inc., licensee of radio station WJR which operates with studios in Detroit, Michigan (R. 33) on 760 kilocycles with 50 kilowatt power, unlimited time, as a Class I-A Clear Channel station, filed a petition for reconsideration and hearing of the grant to Coastal Plains. The petition requested that the Coastal Plains grant be set aside and designated for a hearing in which WJR could participate. This petition was based on the allegation that "objectionable interference" to the service of WJR would be caused by the operation of the new

porting affidavit were equally explicit that the interference from Coastal Plains would occur in areas where the signal strength averaged 32 uv/m, the area of interference was well outside the 100 uv/m contour. Under these circumstances, no question and at the very least no substantial question, was presented by the claim of WJR that its license would be modified as a result of the Coastal Plains grant, so that it would be entitled to the hearing prescribed by Section 312(b) of the Communications Act. It is submitted, therefore, that the Constitution did not require that WJR's petition be designated for oral hearing on "threshold" questions of law.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

BENEDICT P. COTTONE,  
*General Counsel,*  
*Federal Communications Commission.*

January 1949.



## APPENDIX

**COMMUNICATIONS ACT OF 1934, 48 STAT. 1064,  
AS AMENDED, 47 U. S. C. 151, ET SEQ.**

Title III—Special Provisions Relating to Radio.

*License for Radio Communication or Transmission  
of Energy.*

Sec. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is

modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.



### *Revocation of Licenses.*

Sec. 312. (b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

### *Proceedings to Enforce or Set Aside the Commission's Orders—Appeal in Certain Cases.*

Sec. 402. (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

station. (R. 20-22.) An engineering affidavit filed in support of the petition stated that the service of WJR would be interfered with during certain daytime hours in an area in which the field intensity of WJR's signal averages 32 microvolts per meter or less during daytime hours. (R. 22-25.)<sup>1</sup> Cf. Section 1.390(c); formerly 1.387(c), of the Commission's Rules and Regulations, 11 F. R. 891, 177A-417, see Appendix, *infra*, p. 22. On October 18, 1946, Coastal Plains filed an opposition to the petition for reconsideration (R. 26-29). By decision and order, dated December 17, 1946, the Commission denied the petition for reconsideration on the grounds that the interference which petitioner alleged would be caused to the service of WJR was not within a service area entitled to protection under the Commission's Rules and Regulations (R. 35-37). The Decision of the Commission stated:

Station WJR is a Class I-A station. Under the Commission Rules and Standards, Class I-A stations are normally protected daytime to the 100 microvolt-per-meter contour. The area sought by petitioner to be protected is, according to the engineering affidavit accom-

<sup>1</sup> Although the affidavit alleges that, during the winter season, the interference would occur at contours greater than 32 microvolts per meter, no allegation was made that this interference would occur at any time to service within the 100 microvolt-per-meter contour and the case was considered both by the Commission and the court below, without objection by the respondent, as one involving interference to service outside the 100 microvolt per meter contour.

panying the petition, served by Station WJR during the daytime with a signal intensity of 32 microvolts-per-meter or less and is therefore outside the normally protected contour.

On January 7, 1947, appellant filed an appeal in the United States Court of Appeals for the District of Columbia Circuit from the decision of the Commission denying its petition for reconsideration of the grant to Coastal Plains (R. 1-8). On January 13, 1947, Coastal Plains filed a notice of intention to intervene in the appeal. The case was originally argued on March 13, 1947, before Chief Justice Groner and Justices Clark and Prettyman. It was reargued on June 11, and 12, 1947, by direction of the Court before Justices Stephens, Edgerton, Clark, Wilbur K. Miller and Prettyman. On October 7, 1948, the Court reversed the order of the Commission, Justice Stephens delivering the opinion of the court in which Justices Clark and Miller concurred (R. 48-69). Justice Prettyman wrote a dissenting opinion in which Justice Edgerton concurred (R. 69-77).

<sup>2</sup> The order of the court, dated May 22, and 27, 1947, requested reargument on all points. In addition it stated: "The court in particular requests, however, the presentation of argument and authorities in respect of the effect of the Communications Act, the rules and regulations of the Commission, and the due process clause of the Fifth Amendment upon the claimed right of hearing before the Commission upon the question whether the grant of the new application will operate as a modification of the existing license." (R. 47).



In reversing the decision of the Commission, the court below held that before the Commission could dispose of respondent's petition, it was required to afford respondent a hearing, including oral argument, on the "threshold" question of law, namely whether the interference respondent alleged it would suffer was "objectionable interference" against which it was protected under the Communications Act or the Rules and Regulations of the Commission. The opinion of the court below makes clear that if this question is answered in the negative, respondent's petition was without merit. The court holds, however, that the Commission could not decide this question of law without first affording respondent an oral hearing.

Justices Prettyman and Edgerton, dissenting, were of the opinion that respondent was not entitled to an oral hearing on this question of law (R. 69-77). Justice Prettyman pointed out that there was in this case no question whatsoever as to the degree of protection afforded Class I-A stations such as WJR (R. 71-73). He concluded (R. 72-73) that "the facts alleged in the petitions for intervention and hearing, as presented to the Commission, taken as fully true, do not show any threatened interference in the only area in which WJR is protected." It was the view of the minority that (R. 73):

... a person has not established his right to a hearing under the Fifth Amendment, under

the Communications Act, or under the Commission's Rules and Regulations, until he has alleged some fact which indicates a threatened damage to, or modification of, some existing right of his; or facts which at least present a substantial question in that regard. If a person has a right of protection within a 100 uv/m contour, and he alleges that a contemplated new operation will interfere with him at his 32 uv/m contour, he has not alleged that he would be deprived of property by the new operation, or that his license would be modified by it. He has not alleged, factually, that he is entitled to be heard upon the newcomer's application.

#### REASONS FOR GRANTING THE WRIT

1. The effect of the decision below is to create a rigorous and universally applicable requirement that the Federal Communications Commission and other administrative agencies afford each and every petitioner before them oral argument on questions of law raised by their petitions, even though the pleadings neither state facts nor raise any substantial questions of law, which, even when viewed in the most favorable light, would make favorable action on the petition appropriate. Thus the court below expressly holds (R. 54) that

due process of law, as guaranteed by the Fifth Amendment, requires a hearing, including an opportunity to make oral argument, on every question of law raised before a judicial or quasi-judicial tribunal, including questions

raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite*, for temporary injunctions and the like.

And it expressly rejects the view of the minority below that before a right to oral argument may be established, it must be determined that a substantial question exists as to whether the allegations are legally sufficient to warrant favorable action by the tribunal (R. 53-54). The court below holds that oral argument is required regardless of whether the pleadings present such a substantial question of law. A question of importance to other administrative agencies as well as to the Federal Communications Commission, and the courts is thus presented by the decision below, since it would substantially limit the manner in which administrative agencies and courts may carry on their functions without conflict with the Due Process Clause of the Fifth Amendment.

The widespread effect of the decision below is made clear by Justice Prettyman in his dissent (R. 76):

The decision of the court that the Constitution requires an oral hearing on all petitions for intervention would cause extensive revision of the rules of administrative agencies. I have examined many of those rules and find no indication of any thought that such petitions must necessarily be set for oral hearing. The



fact that they make no such provision is, of course, unimportant if they are constitutionally inaccurate in that respect. But it is an interesting circumstance that the requirement is not generally, if at all, recognized. All those rules will have to be revised under the opinion and decision of the court in the present case.

The decision of the court below is so broad and unqualified that it would affect the procedural practices not only of administrative but of judicial tribunals as well. Thus it would unequivocally and in all events require an oral hearing before any court acted upon a demurrer or its modern equivalent, a motion to dismiss. The court below expressly recognized that this was the scope and extent of its ruling (R. 54). But as Justice Prettyman points out (R. 75), Rule 78 of the Federal Rules of Civil Procedure, which provides that a district court may make provision by rule or order for the submission of motions without oral argument upon brief, written statements, or reasons in support and opposition, would be invalid, in the light of the decision of the court below, insofar as that rule may be applied to motions to dismiss complaints.

To afford administrative agencies and courts no leeway or discretion whatever to make summary disposition of pleadings that are insubstantial or frivolous would impose a serious burden on the administration of judicial and quasi-judicial agencies. The large volume of business processed by these tribunals requires that certain pleadings

be handled without the formality of oral argument. In view of the broad scope of the decision below, it is of special importance that the errors of the court below with respect to the necessity for preliminary hearings and oral argument be corrected.

2. This court and others have stated that oral argument is not an essential ingredient of due process.<sup>2</sup> But the practice of the courts speaks even more loudly than their words. See *supra*, p. 9. For example, in *United States v. California*, No. 12, Original, the Commonwealth of Massachusetts, Robert E. Lee Jordan, and various California Indians were all denied leave to intervene without oral argument. 327 U. S. 764; 329 U. S. 689; 332 U. S. 804, 805; 334 U. S. 825. These unquestioned actions of this Court have particular significance here for, as was made clear below (R. 69), leave to intervene was, in essence, what the respondent was asking of the Commission. They constitute, therefore, striking evidence of the extent to which the court below has departed from

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<sup>2</sup> *Morgan v. United States*, 298 U. S. 468, 481; *Peoria Braumeister Co. v. Yellowley*, 123 F. 2d 637 (C.A. 7); *Woodmen of the World Life Ins. Association (Station WOW) v. Federal Radio Commission*, 65 F. 2d 484 (C. A. D. C.); *Sproul v. Federal Radio Commission*, 54 F. 2d 444 (C. A. D. C.); *Foundation Company of Washington v. Federal Communications Commission* (C. A. D. C.), No. 9411, decided February 25, 1947 (appeal from denial without oral argument of petition for rehearing of grant of application to third person dismissed); *State ex rel. School Dist. 8 v. Cary*, 166 Wis. 193.

accepted practice unwarrantedly to impose a requirement of oral argument.

3. There is no claim made here that the respondent did not have full access to the processes of the Commission, that it was not afforded a full opportunity to present its contentions in writing to the Commission, or that the Commission did not give adequate consideration to these contentions. Cf. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 224-229. The Commission disposed of the petition in an opinion responsive to respondent's contentions and explicitly describing the basis for its action. Bearing in mind that the respondent enjoyed an opportunity to secure a judicial adjudication of the correctness of the Commission's decision, a decision with which the court below did not quarrel on the merits, there can be no basis for the view that the respondent has been deprived of a substantial right. There being nothing in the Constitution which prescribes the particular methods by which a person shall be permitted to persuade judicial and quasi-judicial tribunals of the validity of claims they make with respect to pure questions of law that may be involved in proceedings before such tribunals, the decision of the court below is entirely baseless. "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights." *National Labor Relations Board v. Mackay Radio and Telegraph Co.*, 304 U. S. 333, 351.



Since the decision below broadly requires oral argument whether or not a substantial question of law is raised, it is of little consequence, at this juncture, whether the respondent raised any such question. This is particularly true since the court below refused to pass upon the correctness of the Commission's determination that, on the basis of the allegations in respondent's petition, the respondent was not entitled to a hearing under Section 312(b) of the Communication Act (R. 65-66). But to the extent that the substantiality of the respondent's contentions is material, we think it demonstrable that no substantial question was raised.

The law applicable to respondent's petition is well settled. The decision of this Court in *Federal Communications Commission v. National Broadcasting Company, Inc.* (KOA), 319 U. S. 239, makes clear that the rights of a licensee are defined by the Rules and Standards of the Commission which are in substance incorporated in the license.<sup>3</sup>

<sup>3</sup> The court below held that the Due Process Clause was pertinent in the instant case because the impairment of a broadcasting station license by the grant of conflicting facilities to another station is *pro tanto* a deprivation of property. In so doing, it assumed, without regard to the nature and extent of the rights conferred by a radio station license in the light of the applicable provisions of the Communications Act and the Commission's Rules and Standards, that the grant of such a license confers on the licensee rights of "property" (R. 56-57). This assumption is, however, contrary to the express provisions of Sections 301, 304, 307(d) and 309(b) of the Communications Act. Moreover, such an assumption was unnecessary to

*The Standards of Good Engineering Practice Concerning Standard Broadcast Stations* make it indisputably clear that WJR was not entitled to protection against the interference which it alleged would be caused to its ground wave signal in the daytime by reason of the operation of the Coastal Plains station in Tarboro. 4 F. R. 2862, 2865, see Appendix, *infra*; pp. 25-27. Section 3.25(a) of the Commission's Rules explicitly states that additional stations operating during daytime hours only may be assigned to operate on the channel on which WJR is licensed to operate as a Class I-A station. As Justice Prettyman pointed out in his dissent (R. 71), the rights of WJR in daytime "are defined with precision. . . during daytime the Class I station is protected to the 100 uv/m ground wave contour." Since WJR's petition and sup-

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the decision in the case of *L. B. Wilson v. Federal Communications Commission* (C. A. D. C.), decided April 12, 1948, upon which the Court below relies. In the *Wilson* case, *supra*, as well as the companion case of *WJR v. Federal Communications Commission (Southeastern Broadcasting Co., Intervenor)*, (C. A. D. C.), decided October 7, 1948, which were reargued together with the instant case in the Court below on June 11, and 12, 1947, the interference to the existing licensees, which it was alleged would result from the new grants, was within the normally protected contours of the existing stations as defined by the Commission's Rules and Standards. And therefore on the basis of the factual allegations of "objectionable interference" within protected contours, the licensees were entitled to a hearing under the ruling of this Court in *Federal Communications Commission v. National Broadcasting Company (KOA)*, 319 U. S. 239.

caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals, from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

#### *General Powers of Commission.*

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

\* \* \* \*

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with.



### *Waiver by Licensee.*

Sec. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

### *Allocation of Facilities; Term of Licenses.*

Sec. 307. (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

### *Hearings on Applications for Licenses; Form of Licenses; Conditions Attached to Licenses.*

Sec. 309. (a) If upon examination of any application for a station license or for the renewal or

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

## **RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION.**

Sec. 1382. Grants without a hearing.—(a) Where an application for radio facilities is proper upon its face and where it appears from an examination of the application and supporting data that (a) the applicant is legally, technically and financially qualified; (b) a grant of the application would not involve modification, revocation, or non-renewal of any existing license or outstanding construction permit; (c) a grant of the application would not cause electrical interference to an existing station or station for which a construction permit is outstanding within its normally protected contour as prescribed by the applicable Rules and Regulations; (d) a grant of the application would not preclude the grant of any mutually exclusive application; and (e) a grant of the application would be in the public interest, the Commission will grant the application without a hearing.

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the

Commission will not consider any other application as being mutually exclusive with the application under consideration unless such other application was substantially complete and was tendered for filing with the Commission not later than the close of business on the day preceding the day on which the Commission takes action with respect to the application under consideration.

Sec. 1.390. Petitions for reconsideration or for rehearing.—(a) Where an application has been granted without a hearing, any person aggrieved or whose interests would be adversely affected thereby may file a petition for reconsideration of such action. Such petition must be filed with the Commission within 20 days after public notice is given of the Commission's action in granting the application. Such petition will be granted if the petitioner shows that:

(1) Petitioner is an existing licensee or permittee and a grant of the application would require the modification, revocation, or non-renewal of his license or construction permit; or

(2) That petitioner is an existing licensee or permittee and a grant of the application would cause interference to his station within the normally protected contour as prescribed by applicable Rules and Regulations; or

(3) At the time the application was granted, petitioner had a mutually exclusive application pending before the Commission; or



(4) A grant of the application is not in the public interest.

(b) Where an application has been granted or denied after hearing, petitions for rehearing may be filed within 20 days after public notice is given of the Commission's action in granting or denying the application. Petitions for rehearing by persons not parties to the Commission's hearing will not be granted unless good cause is shown as to why it was not possible for such person to participate earlier in the Commission's proceeding.

(c) Where a petition for reconsideration or for rehearing is based upon a claim of electrical interference within the normally protected contour of an existing station or a station for which a construction permit is outstanding, such petition must be accompanied by an affidavit of a qualified radio engineer which shall show either by reference to the Commission's Standards of Good Engineering Practice or to actual measurements made in accordance with the methods prescribed by the Commission's Standards of Good Engineering Practice that electrical interference will be caused to the station within its normally protected contour. If the claim of interference is not based upon actual measurements made in accordance with the Standards of Good Engineering Practice, it may be controverted by affidavit containing results of actual measurements made in accordance with the Standards of Good Engineering Practice.

(d) Any opposition to a petition for reconsideration or rehearing may be filed within 10 days after the filing of such petition.

(e) Petitions for reconsideration or rehearing filed under this section may request (1) reconsideration, either in cases decided after hearing or in the cases of applications granted without hearing; (2) reargument; (3) reopening of the proceeding; (4) amendment of any finding; or (5) such other relief as may be appropriate. Such petition shall state specifically the form of relief sought and, subject to this requirement, may contain alternative requests. Each such petition shall state with particularity in what respect the decision, order or requirement or any matter determined therein is claimed to be unjust, unwarranted, or erroneous, and with respect to any finding of fact must specify the pages of record relied on. Where the petition is based upon a claim of newly discovered evidence, it must be accompanied by a verified statement of the facts relied upon, together with the facts relied on to show that the petitioner, with due diligence, could not have known or discovered such facts at the time of the hearing.

(f) The filing of a petition for reconsideration or rehearing shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof. However, upon good cause shown the Commis-

sion may stay the effectiveness of its order or requirement pending a decision on the petition for rehearing. [11 F. R. 891, 177A-416-417, 13 F. R. 660].

\* \* \* \*

Sec. 3.22. Classes and power of standard broadcast stations.—(a) Class I station.—A “Class I Station” is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in section 3.25 or in accordance with the “Engineering Standards of Allocation.” The operating power shall be not less than 10 kw nor more than 50 kw (also see section 3.25 (a) for further power limitation).

(b) Class II station. A “Class II Station” is a secondary station which operates on a clear channel (see section 3.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from Class I stations. A station of this class shall operate with power not less than 0.25 kilowatts nor more than 50 kilowatts. Whenever necessary a Class II station shall use a directional antenna or other



means to avoid interference with Class I stations and with other Class II stations, in accordance with the "Engineering Standards of Allocation."

Sec. 3.25 Clear Channels; Class I and II stations.—

The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 750, 760, 770, 780, 820, 830, 840, 870, 880, 890, 1020, 1040, 1100, 1120, 1160, 1180, 1200, and 1210 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kilowatts. [4 F. R. 2715-2716, 5 F. R. 3670, 6 F. R. 2554].

## **STANDARDS OF GOOD ENGINEERING PRACTICE CONCERNING STANDARD BROADCAST STATIONS (550-1600 KC).**

(4 F. R. 2862).

### **1. Engineering Standards of Allocation.**

(2) From an engineering point of view, Class I stations may be divided into two groups:

(a) The Class I stations in Group I are those assigned to the channels allocated by Section 3.25,

paragraph (a), on which duplicate nighttime operation is not permitted, that is, no other station is permitted to operate on a channel with a Class I station of this group within the limits of the United States (the Class II stations assigned the channels operate limited time or daytime only), and during daytime the Class I station is protected to the 100 uv/m ground wave contour. Protection is given this class of station to the 500 uv/m ground wave contour from adjacent channel stations for both day and nighttime operations.<sup>1</sup> The power of each Class I station shall not be less than 50 kw.

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<sup>1</sup> See Tables IV and V.

\* \* \* \*





Extracts from Table IV (4 F. R. 2865)—Protected service contours and permissible interference signals for broadcast stations.

Class of Station	Class of channel used	Permissible power	Signal intensity contour of area protected from objectionable interference <sup>1</sup>		Permissible interference signal on same channel <sup>2</sup>	
			Day <sup>3</sup>	Night	Day <sup>3</sup>	Night <sup>4</sup>
Ia	Clear	50 kw	SC 100. uv/m	Not duplicated	5 uv/m	Not duplicated
			AC 500 uv/m			

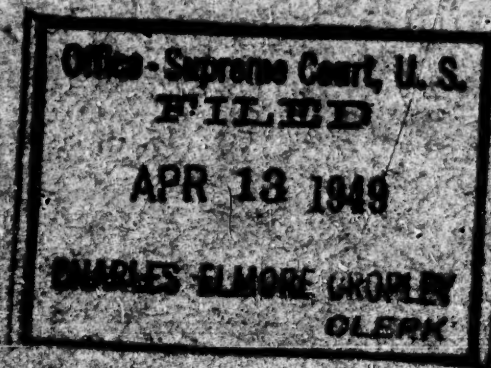
<sup>1</sup> When it is shown that primary service is rendered by any of the above classes of stations, beyond the normally protected contour, and when primary service to approximately 90 percent of the population (population served with adequate signal) of the area between the normally protected contour and the contour to which such station actually serves, is not supplied by any other station or stations, the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration. When a station is already limited by interference from other stations to a contour of higher value than that normally protected for its class, this contour shall be the established standard for such station with respect to interference from all other stations.

<sup>2</sup> For adjacent channels see Table II.

<sup>3</sup> Groundwave.

<sup>4</sup> Skywave field intensity for 10 percent or more of the time.

LIBRARY  
SUPREME COURT, U.S.



No. 495

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**In the Supreme Court of the United States**

OCTOBER TERM, 1948

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FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

WJR, THE GOODWILL STATION, INC. AND COASTAL  
PLAINS BROADCASTING Co., INC., INTERVENOR-  
RESPONDENT

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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## OPINIONS BELOW

The decision and order of the Federal Communications Commission have not yet been reported (R. 25-27). The opinions in the United States Court of Appeals for the District of Columbia Circuit have not yet been reported (R. 38-67).<sup>1</sup>

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<sup>1</sup> These opinions have been printed, however, in 3 Pike and Fischer, *Radio Regulation*, p. 793, and 4 Pike and Fischer, *Radio Regulation*, p. 2056.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1948 (R. 67-68). The petition for a writ of certiorari was filed on January 4, 1949, and granted on February 28, 1949, in an order transferring the case to this Court's summary docket (R. 71). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1):

### QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment requires that the Federal Communications Commission must first hear oral argument on behalf of one who objects to the grant of an application to another for a new radio station before it may determine, in the light of the undisputed facts alleged by the objector and the applicable provisions of the Communications Act and the Commission's Rules and Standards, that no showing whatsoever has been made that the grant of the new application could operate as a modification of the objector's existing license.

### STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.* (hereinafter referred to as the "Communications Act") are printed in Appendix A, *infra*, pp. 48-53.

### STATEMENT

On May 28, 1946, Coastal Plains Broadcasting Company, Inc. (formerly Tarboro Broadcasting

Company, Inc.) filed an application for a construction permit for a new standard broadcast station to be located in Tarboro, North Carolina, and to operate on the frequency 760 kilocycles with 1 kilowatt power during the daytime hours only (R. 13-14). This application was consistent with Sections 3.22 and 3.25 (a) of the Commission's Rules and Regulations (4 F. R. 2715-2716; 5 F. R. 3670; 6 F. R. 2544, see Appendix A, *infra*, pp. 57, 58), authorizing the licensing of Class II stations operating daytime only on Class I or clear channels, among them the frequency 760 kilocycles. The Commission, upon examination of the application of Coastal Plains, on August 22, 1946, granted that application without hearing in accordance with Section 309 (a) of the Communications Act and Section 1.382 (a) (formerly Section 1.381) of the Commission's Rules (R. 14), which provides, in part, that the Commission will grant an application without hearing "where an application for radio facilities is proper upon its face and where it appears from an examination of the application and supporting data that \* \* \* [*inter alia*] (b) a grant of the application would not involve modification, revocation, or nonrenewal of any existing license or outstanding construction permit; (c) a grant of the application would not cause additional electrical interference to an existing station or stations for which a construction permit is outstanding within its normally protected contour as



prescribed by the applicable Rules and Regulations; \* \* \* 11 F. R. 891, 177A-416, 13 F. R. 660, see Appendix A, *infra*, pp. 51, 53.

On September 10, 1946, WJR, The Goodwill Station, Inc., licensee of radio station WJR which operates with studios in Detroit, Michigan (R. 23), on 760 kilocycles, with 50 kilowatt power, unlimited time, as a Class I-A clear channel station, filed a petition for reconsideration and hearing of the grant to Coastal Plains. The petition requested that the Coastal Plains grant be set aside and designated for a hearing in which WJR could participate. This petition was based on the allegation that "objectionable interference" to the service of WJR would be caused by the operation of the new station (R. 14-16). An engineering affidavit filed in support of the petition stated that the service of WJR would be interfered with during certain daytime hours in an area in which the field intensity of WJR's signal averages 32 microvolts per meter or less during daytime hours (R. 16-18).<sup>2</sup> Cf. Section 1.390 (c), formerly 1.387 (c), see Appendix A, *infra*, p. 55. In addition, the petition alleged

<sup>2</sup> Although the affidavit alleges that, during the winter season, the interference would occur at contours greater than 32 microvolts per meter, no allegation was made that this interference would occur at any time to service within the 100 microvolt-per-meter contour, and the case was considered both by the Commission and the Court below, without objection by the respondent, as one involving interference to service outside the 100 microvolt-per-meter contour.

that the Commission's action in granting the Coastal Plains application prior to the conclusion of a pending rulemaking proceeding, usually referred to as the "Clear Channel Hearing" (FCC Docket No. 6741), was improper in that it prejudices a grant of a future application for increased power that might be filed by WJR in the event that the Commission's Rules were changed to permit the entertaining of such applications (R. 15-16).

On October 18, 1946, Coastal Plains filed an opposition to the petition for reconsideration (R. 19-21) on the grounds, among others, that respondent "has not alleged that the proposed operation of Tarboro Broadcasting Company would cause any interference within the normally protected service area of station WJR" and that respondent "has not alleged nor has it proven any interference within its normally protected contours" (R. 19). No response to this opposition was filed by respondent.

By decision and order, dated December 17, 1946, the Commission denied the petition for reconsideration on the grounds that the interference which it was alleged would be caused to the service of WJR was not within the protection accorded by the Commission's Rules and Regulations (R. 25-27).<sup>3</sup> The decision of the Commission stated (R. 26):

<sup>3</sup> In its decision, the Commission noted that no question was raised as to the applicability of that provision in its

Station WJR is a Class I-A station. Under the Commission's Rules and Standards, Class I-A stations are normally protected daytime to the 100 microvolt-per-meter contour. The area sought by petitioner to be protected is, according to the engineering affidavit accompanying the petition, served by Station WJR during the daytime with a signal intensity of 32 microvolts-per-meter or less, and is therefore outside the normally protected contour.

The Commission further found that it would not be in the public interest to set aside the Coastal Plains grant, made in compliance with the Rules, and which afforded a new primary service to 274,307 people in an area of 4,540 square miles solely because of the possibility that the grant might limit a future assignment to WJR on its Class I channel upon the termination of the Clear Channel Hearing (R. 26).

On January 7, 1947, the respondent filed an appeal in the United States Court of Appeals for the District of Columbia Circuit from the decision of the Commission denying its petition for reconsideration of the grant to Coastal Plains (R. 1-6). On January 13, 1947, Coastal Plains filed a notice

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Standards of Good Engineering Practice Concerning Standard Broadcast Stations having to do with a station which renders primary service to approximately 90 per cent of the population in an area outside its normally protected contours (R. 26, note 1). See Appendix A, *infra*, p. 60. Nor has such question been raised by the respondent in the subsequent proceedings in this case.



of intention to intervene in the appeal. The case was originally argued on March 13, 1947, before Chief Justice Groner and Justices Clark and Prettyman. It was reargued on June 11, and 12, 1947, by direction of the Court before Justices Stephens, Edgerton, Clark, Wilbur K. Miller and Prettyman. (R. 38.)

In its decision, the court passed on the merits of the contention of the respondent that the Commission should have deferred action on the Coastal Plains application until the conclusion of the Clear Channel Hearing. On this issue, it unanimously concluded that this claim did not afford any basis for setting aside the grant to Coastal Plains. (R. 41.) The majority of the court held, however, that before the Commission could dispose of the remaining portion of respondent's petition relating to the claim that it was entitled to a statutory hearing on the modification of its license, it was required to afford respondent a hearing, including oral argument, on the "threshold" question of law, namely whether the interference respondent alleged it would suffer was objec-

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<sup>1</sup> The order of the Court, dated May 22 and 27, 1947, requested reargument on all points. In addition it stated: "The court in particular requests, however, the presentation of argument and authorities in respect of the effect of the Communications Act, the rules and regulations of the Commission, and the due process clause of the Fifth Amendment upon the claimed right of hearing before the Commission upon the question whether the grant of the new application will operate as a modification of the existing license." (R. 37.)

tionable interference" against which it was protected under the Communications Act or the Rules and Regulations of the Commission (R. 41-55). The court below conceded that if this question were answered in the negative respondent's petition would be without merit (R. 42-43). It held, however, that the Commission could not decide this question of law without first affording respondent an oral hearing.

Justices Prettyman and Edgerton, dissenting, were of the opinion that respondent was not entitled to an oral hearing on a written petition which did not contain "at least some shadow of factual ground for his prayer" (R. 59-67).

#### SUMMARY OF ARGUMENT

##### I

In holding broadly that oral argument of questions of law is required by the Due Process Clause, the court below has adopted an approach which is in striking contrast to that taken by this Court when faced with related problems. It has often been held by this Court that questions of procedural due process are not to be solved by formulae or rigid generalizations, and that the constitutional necessities are to be determined in the light of the circumstances of the particular case. *E. g.*, *Betts v. Brady*, 316 U. S. 455, 462; *National Labor Relations Board v. Mackay Radio and Telegraph Co.*, 304 U. S. 333, 351.

A general requirement of oral argument is inconsistent with the practice of this and other courts. Its imposition in this case, moreover, ignores "the differences in origin and function between administrative bodies and courts [which precludes] wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *Wallace Corp. v. National Labor Relations Board*, 323 U. S. 248, 253.

This Court has stated that "Argument may be oral or written" (*Morgan v. United States*, 298 U. S. 468, 481), and, in *Yakus v. United States*, 321 U. S. 414, 436, rejected an attack on the validity of the Price Control Act for its failure to afford a guarantee of oral argument in all administrative protest proceedings. Only under a rule of such flexibility can procedures which are wasteful of both time and manpower be dispensed with, and the public and private interests affected properly served. The ultimate question of fairness cannot be answered by imposing a universal requirement of oral argument. The decision of the court below gives rise to the danger that unsubstantial and dilatory claims will be encouraged to a point which would seriously interfere with the efficient working of courts as well as administrative agencies.



## II

There can be no question but that the respondent was fairly treated by the Commission in this case. No claim is made that respondent was denied full access to the processes of the Commission, that it was not offered a full opportunity to present its contentions in writing to the Commission, or that the Commission did not give adequate consideration to these contentions. The respondent did not even ask the Commission for the oral argument to which the court below held it to be entitled under the Due Process Clause. Its complaint to the court below was not that the Commission was unfair but, rather, that the Commission was wrong in denying the relief sought by the respondent.

What the respondent had asked the Commission to do was to set aside its grant of a construction permit to a third party, the intervener in this case, and either to defer action on the third-party application or hold a formal hearing in which such questions as whether the public interest requires operation of the new station at the cost of indirect modification of the respondent's license could be determined. But the Commission found, at the outset, that respondent's petition, viewed in its most favorable light, made no allegations of such interference as would work any modification of its license.

That ruling was patently correct under the Communications Act, the Commission's Rules and Standards, and pertinent judicial decisions. A station like respondent's, under the Commission's standards, is protected to the 100-microvolt-per-meter contour. But the interference alleged by the respondent was with a signal averaging only 32 microvolts per meter or less. In taking the respondent's pleading at face value and measuring it against rules the meaning of which is clear, the Commission hardly denied the respondent due process. Any error in the Commission's decision could be corrected on review and the substantial rights of the respondent thus entirely protected.

While agreeing that respondent's rights were to be measured against the statute and the Commission's rules and regulations, the court below seems to have held that the nature of a licensee's interest is such as to make oral argument constitutionally requisite. Contrary to the decisions of this Court (*e. g.*, *Federal Communications Commission v. Sanders Radio Station*, 309 U. S. 470, 475), it attributed to a station licensee a property right apparently broader in scope than the non-property right conferred by the license when read in the light of the Act and regulations which are, as this Court has held, the measure of that right. *Federal Communications Commission v. National Broadcasting Company*

(*KOA*), 319 U. S. 239. In so doing, the court below compounded its error.

As the dissenters below found, the respondent's contentions were entirely unsubstantial. Nevertheless, the respondent was given an opportunity to make them and the Commission fully considered them. Under the circumstances, the respondent was deprived of neither a procedural nor a substantive right.

#### ARGUMENT

*Introduction.*—The court below has held that the Federal Communications Commission acted in contravention of the Due Process Clause when it concluded, on the basis of respondent's petition and intervenor-respondent's opposition, that respondent presented no such claim of modification of license as to entitle it to a hearing under the provisions of Section 312 (b) of the Communications Act,<sup>5</sup> in the light of the undisputed facts presented by respondent's petition and the applicable provisions of the Commission's Rules and Standards defining the extent of the protection to which respondent is entitled. In reaching this result, the court below did not pass on the correctness of the Commission's conclusion that respondent's petition was entirely without merit. It appears to hold that, whether or not that is so, the Due Process Clause is violated if the Commission does not first hear oral argument before

<sup>5</sup> See Appendix A, *infra*, p. 52.



it reaches the conclusion that respondent is not entitled to the statutory hearing afforded by Section 312 of the Act because its petition does not set out facts making the provisions of Section 312 applicable.

The decision of the court below is rested upon the broadest possible grounds. Beyond the fact that the interest for which the respondent seeks protection stems from a radio station license,<sup>6</sup> no special circumstances are pointed to which are deemed to make an oral argument essential to a fair hearing in this case. To the court below, the Due Process Clause imposes an inflexible requirement of oral hearing (R. 44):

due process of law, as guaranteed by the Fifth Amendment, requires a hearing, including an opportunity to make oral argument, on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite*, for temporary injunctions and the like.

In Point I of our Argument, we shall show that there is no warrant whatever for such a rigorous reading and mechanical application of the Due Process Clause. Point II of the Argument is

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<sup>6</sup> The bearing of the fact that the respondent is a radio station licensee is discussed in Point II, *infra*, pp. 43-45.

designed to show that under all the circumstances of this case, the respondent was, in fact, accorded procedural due process.

# I

THE DUE PROCESS CLAUSE DOES NOT IMPOSE A UNIVERSAL REQUIREMENT OF A FORMAL HEARING CONSISTING OF AT LEAST ORAL ARGUMENT ON ALL ADMINISTRATIVE PROCEEDINGS, WITHOUT REGARD TO APPLICABLE STATUTORY PROVISIONS, THE NATURE OF THE INTERESTS INVOLVED, AND OTHER PERTINENT CONSIDERATIONS

The broad sweep of the decision below presents the fundamental question whether administrative agencies, in adjudicating specific issues in the conduct of their functions, must rely exclusively on procedures entailing oral argument of issues of law in order to afford due process. The issue thus presented is whether due process necessarily requires "audible process."

The mere statement of this issue—general in scope, rigid in application—is in striking contrast to the traditional and accepted approach of this Court to problems of procedural due process. This Court has consistently and carefully avoided any holdings of broad scope defining the occasions on which the Due Process Clause requires a particular type of procedure such as formal hearing of oral testimony or oral argument in connection with the conduct of administrative and, indeed, judicial proceedings. The reason for this caution is articulated in the observations of this Court in *Betts v. Brady*, 316 U. S. 455, 462:

Due process of law is secured against invasion by the federal Government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed.

Similarly, in the case of *National Labor Relations Board v. Mackay Radio and Telegraph Co.*, 304 U. S. 333, 351, this Court has pointed out that "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights."

A reading of the opinion below makes inescapable the conclusion that the court below was imposing a universal requirement of formal hearing consisting of at least oral argument on all administrative processes, because of its view that



courts have traditionally dealt with questions of law in this way and that the consistent practices of the court are an accurate reflection of the requirements of due process. Two difficulties are, however, presented by this assumption. The first is that it is in fact not a universal practice of the courts to afford oral argument on every claim embodying a question of law, without regard to the nature of the claim, the context in which it arises, and the substantiality or frivolousness of the claim. The practice of this Court on motions to intervene and similar pleadings is but one illustration. For example, in *United States v. California*, No. 12, Original, the Commonwealth of Massachusetts, Robert E. Lee Jordan, and various California Indians were all denied leave to intervene without oral argument. 327 U. S. 764; 329 U. S. 689; 332 U. S. 804, 805; 334 U. S. 825. This practice has particular significance here for, as was made clear below (R. 69), leave to intervene was, in essence, what the respondent was asking of the Commission. And as Justice Prettyman points out in his dissent below (R. 65), Rule 78 of the Federal Rules of Civil Procedure makes provision for disposition of matters on the pleadings without oral argument, without qualification as to whether the matters are interlocutory or may result in a final disposition. Under the decision of the court below, it would seem that Rule 78 and local court

rules adopted pursuant thereto<sup>7</sup> would be invalid in so far as they might be applied to motions to dismiss under Rule 12 (b), motions for summary judgment under Rule 56, motions to strike pleadings for insufficient defense under Rule 12 (f), motions to intervene under Rule 24, and motions to strike a pleading under Rule 33. Moreover, the courts have long reserved the power summarily to strike frivolous pleadings, which are generally described in the decisions as pleadings which conclusively appear to be legally insufficient on their face.<sup>8</sup>

<sup>7</sup> Rule 78 provides that a district court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition. Many of the local court rules adopted pursuant to Rule 78, make clear that parties are not as a matter of right entitled to oral argument under any and all circumstances. See Local Court Rules Arkansas (W. D.) Rule 8; Iowa (N. D.) Rule 3; Ohio (N. D.) Rule 2; California (N. D.) Rule 3; California (S. D.) Rule 3; Louisiana (E. D.) Rule 3; Missouri (W. D.) Rule 10. See also *Suggested Local Rules for the United States District Court*, drafted by the Committee on Local District Court Rules of the Judicial Conference of Senior Circuit Judges, 4 Fed. Rules Serv. 1022. Rule 2 of the suggested Local Rules for the United States District Courts, typically provides, in part: "Motions, in general, shall be submitted and determined upon the motion papers hereinafter referred to. Oral arguments of motions will be permitted on application and proper showing."

<sup>8</sup> See *Piuma v. United States*, 126 F. 2d 601 (C. A. 9); *Leaver v. Parker*, 121 F. 2d 738 (C. A. 9); *Commander Milling Co. v. Westinghouse Electric and Manufacturing Co.*, 70 F. 2d 469 (C. A. 8); *Dominion National Bank of*

The second difficulty with the assumption of the court below, that in passing on the constitutional adequacy of all administrative proceedings due process must be equated to judicial process, is that it is contrary to the consistent view of this Court that, "The differences in origin and function between administrative bodies and courts preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."

*Wallace Corp. v. National Labor Relations Board*, 323 U. S. 248, 253; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134. Much the same view has been articulated by the English Courts in passing upon issues closely comparable to those presented in the instant case. *Local Government Board v. Arlidge* [1915] A. C. 120.<sup>9</sup>

*Bristol v. Olympia Cotton Mills*, 128 Fed. 181 (C. C. D. S. C.); *Hespe v. Corning Glass Works*, 9 F. Supp. 725 (W. D. N. Y.); and *United States v. Delaney*, 8 F. Supp. 224 (D. N. J.).

<sup>9</sup> The following excerpts from the opinions delivered in the House of Lords are especially illuminating in reflecting the considerations underlying the conclusion of the House of Lords that fair procedure by administrative bodies does not necessarily require judicial procedure.

In his opinion, Lord Haldane stated<sup>1</sup> ([1915] A. C. at 132):

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The



But, as already stated, the basic difficulty with the decision of the court below lies in its attempt

decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal."

In his opinion, Lord Shaw stated ([1915] A. C. at 138) :  
 "My Lords, when a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term 'natural justice' means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous."

In his opinion, Lord Moulton stated ([1915] A. C. at 150-151) :

"In the present case, however, the Legislature has provided an appeal, but it is an appeal to an administrative department of State and not to a judicial body. It is said, truthfully, that on such an appeal the Local Government Board must act judicially, but this, in my opinion, only

to distil out of the Due Process Clause a general requirement, admitting of virtually no exception,<sup>10</sup> of oral argument. We have already seen that such a generalizing approach is markedly inconsistent with that of this Court in the field of procedural due process. And there are additional decisions of this Court dealing directly with the problem of oral argument which point out the error of the court below. Thus, in the first *Morgan* case (298 U. S. 468, 481), this Court stated that "Argument may be oral or written."

means that it must preserve a judicial temper and perform its duties conscientiously, with a proper feeling of responsibility, in view of the fact that its acts affect the property and rights of individuals. Parliament has wisely laid down certain rules to be observed in the performance of its functions in these matters, and those rules must be observed because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for what I may call quasi-litigious procedure depends solely on what Parliament has thought right. These rules are beyond the criticism of the Courts, and it is not their business to add to or take away from them, or even to discuss whether in the opinion of the individual members of the Court they are adequate or not. In the present case they appear to me to be abundantly sufficient to secure that the Local Government Board shall be fully seised of the facts of the case in which it is called in, and that it can and will get all necessary guidance as to the law. But even if my opinion were the reverse it would only indicate that I disapproved of the legislation. It could not give rise to any question as to the statutory procedure conforming or not conforming to any notions of my own as to 'natural justice.'"

<sup>10</sup> The only exception stated by the court below is in the decision of "such questions of law as may be involved in interlocutory orders \* \* \*" (R. 44).

And in *Yakus v. United States*, 321 U. S. 414, the contention was made that the administrative hearing provided by the statute was inadequate, for one thing because of the lack of a guaranty that oral argument would be available. To this, the Court responded (321 U. S. at 436):

While the hearing on a protest may be restricted to the presentation of documentary evidence, affidavits and briefs, the Act contemplates, and the Administrator's regulations provide for, a full oral hearing upon a showing that written evidence and briefs "will not permit the fair and expeditious disposition of the protest." \* \* \* In advance of application to the Administrator for such a hearing we cannot well say whether its denial in any particular case would be a denial of due process.

This can only mean, in flat contradiction of the decision of the court below, that the Due Process Clause lays down no general requirement of oral argument and that whether oral argument is a constitutional requisite depends upon the circumstances of the particular case.<sup>11</sup>

<sup>11</sup> See also *Peoria Braumeister Co. v. Yellowley*, 123 F. 2d 637 (C. A. 7); *Woodmen of the World Life Insurance Association (Station WOW) v. Federal Radio Commission*, 65 F. 2d 484 (C. A. D. C.); *Sproul v. Federal Radio Commission*, 54 F. 2d 444 (C. A. D. C.); *Foundation Company of Washington v. Federal Communications Commission* (C. A. D. C.), No. 9411, decided February 25, 1947 (appeal from denial by Commission without oral argument of petition for rehearing of grant of application of third person dismissed without oral



The court below has cited no decisions of this or any other court which in any way support its expansive holding. The cases of *Galpin v. Page*, 18 Wall. 350, 368, and *In re Galvin's Estate*, 153 Misc. 11, 274 N. Y. S. 846, relied on by the court below (R. 44, 48) are concerned solely with the question of compliance with due process requirements only so far as they relate to the question whether adequate notice had been afforded.<sup>12</sup> Only the de-

argument by court); *State, ex rel; School Dist. 8 v. Cary*, 166 Wis. 103; *Local Government Board v. Arlidge*, *supra*.

<sup>12</sup> The case of *Galpin v. Page*, is obviously but one of many illustrations of the principle that a person may not be subjected to a personal judgment in judicial proceedings unless he has been afforded adequate notice and an opportunity to be heard.

The case of *In re Galvin's Estate* is concerned with a variant of this same principle. That decision does not at all hold that due process is denied if any claim of a party who has already appeared is dealt with by a procedure other than hearing of oral testimony or oral argument. That decision holds only that personal notice must be afforded a creditor where the statute provides for such personal notice, and that the alternative statutory procedure of dispensing with notice if the amount is small and the whereabouts of the creditor cannot be ascertained, by leaving the accounting nonfinal against such creditor, may be unconstitutional. It is, in any event, doubtful whether the Surrogate properly read the statute and whether a federal court would feel itself bound to reach the same result under the Fifth Amendment. For the *Galvin* decision would make unconstitutional every *in rem* proceeding where a party in interest is not first served even though the judgment would not be conclusive against such a party, and that party's possible interest in the *res* has been preserved.

The court below also relies on Webster's argument in

cisions of this Court in *Londoner v. Denver*, 210 U. S. 373, and *Morgan v. United States*, 304 U. S. 1; appear to be invoked by the court below in support of its ruling on the question of oral argument (R. 44). In *Londoner v. Denver*, a divided Court, Mr. Chief Justice Fuller and Mr. Justice Holmes dissenting, did hold that a state assessment proceeding did not comport with due process when affected landowners were not afforded an opportunity to be heard in support of complaints and objections filed by them. But in holding that "an opportunity \* \* \* to submit in writing all objections to and complaints of the tax to the board" was not enough to satisfy due process requirements (210 U. S. at 386), the Court did not broadly rule, as did the court below, that oral argument is always an essential ingredient of due process. For the Court took pains to limit its ruling to "such circumstances" as were before it, among which was the lack of any opportunity to the taxpayers "to object in the courts to the assessment" (210 U. S. at 386; compare *infra*, p. 41). And in that very same year, in

*Dartmouth College v. Woodward*, 4 Wheat. 518, 581, as expressive of general principles pertinent in the instant case (R. 44). But in this part of his argument in the *Dartmouth College* case, Webster was addressing himself to the problem of whether any legislative alteration of the charter could be "the law of the land." He was not at all contending that the passage of the statute altering the charter would be in accordance with the "law of the land" if the trustees had been afforded an opportunity to be heard prior to the passage of the legislation.

an opinion by Mr. Justice Moody, who had spoken for the Court in the *Londoner* case, this Court stated that the hearing requirement was there imposed "for peculiar reasons, in some forms of taxation (see *Londoner v. Denver*, 210 U. S. 373)". *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 278.<sup>13</sup>

*Morgan v. United States*, 304 U. S. 1, also relied on by the court below, does not even mention oral argument as an essential ingredient of due process. In that case, this Court merely held that the right to submit argument implies a reasonable opportunity to know the claims of the opposing party and to meet them. See 304 U. S. at 18. Here there is no complaint that the respondent did not have full knowledge of the issues involved. Further, *Morgan v. United States*, 304 U. S. 1, like the earlier *Morgan* case, *supra*, 298 U. S. 468, involved a situation in which the applicable statute required a hearing. The case at bar does not involve the application of statutory provisions requiring a hearing to the pro-

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<sup>13</sup> *Erie R. R. Co. v. Paterson*, 79 N. J. L. 512, relied on by the court below, simply follows the decision of this Court in the *Londoner* case. *State ex rel. Arnold v. Common Council*, 157 Wis. 505, and *State ex rel. Hughes v. Milhollan*, 50 N. D. 184, also relied on by the court below, did not rest on due process grounds but were concerned, rather, with determining the meaning of local law requirements for formal hearing. And compare the decision in the *Arnold* case, *supra*, with *State ex rel. School Dist. 8 v. Cary*, 166 Wis. 103.



cedure followed by the Commission in denying respondent's petition. Certainly, in the light of this Court's statement in *Morgan v. United States*, 298 U. S. 468, 481, that "argument may be oral or written," there can be no basis for the reliance of the Court below on *Morgan v. United States*, 304 U. S. 1, for the holding that oral argument is an essential element of due process.<sup>14</sup>

The impact of imposing on administrative agencies a universally applicable requirement of oral hearing of testimony or argument as the only procedure which will comply with the requirements of due process, cannot be underesti-

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<sup>14</sup> Respondent, in its opposition to the petition for a writ of certiorari in this case (pp. 17-18), attempts to distinguish those cases in which a hearing has been afforded with respect to facts before a hearing examiner. It is submitted, however, that under the doctrine of the court below such a distinction is irrelevant. For, if the opportunity to present evidence as to the facts before a hearing examiner can serve as a substitute for the opportunity to persuade the tribunal as to the law, there would appear to be no requirement for oral argument in this case, since this case presents a situation substantially identical with one in which respondent has had an opportunity to present oral testimony before a hearing examiner and the Commission has accepted respondent's view of the facts as submitted to such an examiner. The opportunity to present evidence as to the facts cannot serve as a substitute for the opportunity to persuade the tribunal as to the law. Accordingly, under the logic of the court below, an opportunity to present evidence would not satisfy the requirements created by the court below with respect to oral hearing on matters of law. Under the view of the court below, one is entitled to oral argument on matters of law whether or not one has had an opportunity to present oral testimony with respect to the facts.

mated. There are innumerable situations at the present time in which administrative agencies pass on questions of law by means of procedures other than the hearing of oral testimony and argument. See Appendix B, *infra*, pp. 61 *et seq.* Just as no blanket judgment can be made in advance of consideration of the particular facts and procedures available that all of these procedures are necessarily adequate, so it is equally impossible and undesirable to make an *a priori* judgment that all such procedures are necessarily inadequate to fulfill the requirements of due process.

It is clear from the summary set out in Appendix B that the Federal departments and administrative agencies have attempted to establish procedures best suited to particular proceedings which will provide avenues for arriving at fair determinations of the matters presented to those tribunals in such proceedings. Frequently, statutes require oral argument in specific types of administrative proceedings. See, *e. g.*, Section 409 (a) of the Communications Act. Further, administrative agencies have in general been liberal in the granting of oral argument where such argument is deemed to be fruitful to the determination of the issues involved in any proceedings. Thus, the Federal Communications Commission invariably affords oral arguments in hearings held before individual Commissioners,

even though Section 409 (a) of the Act is not applicable to such a proceeding. See, *e. g.*, Section 1.854 of the Commission's Rules and Regulations, 11 F. R. 1452, 12 F. R. 3671-3672. The Federal Communications Commission always affords oral argument in important rule-making or legislative proceedings even though no oral argument is required, and in many instances, such as with respect to procedural rules, no proposed rule-making proceedings of any kind is required. Section 4 (b) of the Administrative Procedure Act, 60 Stat. 239, 5 U. S. C. 1003 (b); compare *Bi-Metallic Co. v. Colorado*, 259 U. S. 441. But administrative agencies must be given some discretion to determine when oral argument, not required by statute, will in fact be an aid to the disposition of a pending matter.

In view of the many types of administrative proceedings arising under the statutes administered by Government agencies, in some of which time is necessarily of the essence, if the public interests or the interests of regulated persons are not to be adversely affected, rigid procedural requirements suited to one type of proceeding should not be required in other types of proceedings where they might be unnecessary and even possibly unfair. Thus, even if oral argument on questions of law may be required in connection with some types of proceedings, this requirement should not be imposed rigorously and with uni-



versal application to all administrative proceedings. If the standards for administrative procedure should come to depend upon rigidly prescribed formal requirements instead of upon considerations of fairness and practicability, agencies and those having business with them would frequently be driven to follow procedures which would be wasteful of both time and manpower and would serve neither the public nor the private interests affected. Both agencies and the parties before them would be compelled to meet such rigid procedural requirements for the sole purpose of avoiding possible grounds for capricious attack upon orders or rules. Such procedural provisions would furnish a weapon for destruction and delay not only to persons who may be striving to circumvent the statutes but also to obstructionists seeking to prevent agency authorization of legitimate transactions sought by other parties.

Thus if the decision of the Court of Appeals, making oral argument a matter of right, is left unimpaired, it is believed that there is danger that unsubstantial and dilatory claims may be encouraged to the point which would seriously interfere with the timely disposition of proceedings. Moreover, as the dissenting opinion notes, the question of whether opportunity for oral argument is a matter of due process is interrelated with the question of how long a period for argument constitutes due process (R. 65-66). An

arbitrary determination with respect to time allotted for oral argument would be invalid. "A rule designed to meet constitutional requirements, and effective to that purpose, would have to be phrased in terms of adequacy of presentation" (R. 66). Further, if the agency does not have the power to deny oral argument where it is deemed that such argument will not aid the dispositional processes, it is difficult to see at what point it may limit oral argument or direct counsel to confine their argument to what appear to the tribunal to be relevant issues. If possible disagreement by a reviewing court on rulings of this character is to be ground for reversal, agencies will be compelled as a matter of precaution to give more time to oral argument than they believe warranted. It is difficult to believe that curtailment of discretion in making judgments of this type by the imposition of a vigorous rule is indispensable to preserve the fairness guaranteed by the Due Process Clause.

## II

THE COMMISSION'S ACTION WAS ENTIRELY PROPER ON THE FACTS IN THIS CASE AND DEPRIVED RESPONDENT OF NO RIGHTS IN CONTRAVENTION OF THE COMMUNICATIONS ACT OR THE DUE PROCESS CLAUSE

Since, as has been shown above, the Due Process Clause imposes no general and rigid requirement of oral argument which operates to invalidate the Commission's decision, we turn now to the question whether, on the facts in this case, the

Commission treated respondent with the fairness which is required by the Due Process Clause. Examination of these facts shows that the Commission gave full and fair treatment to respondent's petition, and that it properly disposed of the petition in a manner which did not deny respondent any rights under the Due Process Clause or the Communications Act of 1934.

There is no claim made here that the respondent did not have full access to the processes of the Commission, that it was not afforded a full opportunity to present its contentions in writing to the Commission,<sup>15</sup> or that the Commission did not give adequate consideration to these contentions. Cf. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 224-229. As the court below recognized (R. 58-59), the respondent never asked for any preliminary hearing, including oral argument, on "the question whether or not the allegations of the petition, assuming their truth, shows that WJR's license would be indirectly modified by the operation of the Coastal Plains station." We do not now quarrel with the view of the court below that if further hearing were requisite, the respondent should not have been denied it because of the inadequacy or generality of its claim to a

<sup>15</sup> While the Commission's Rules and Regulations do not expressly provide for the filing of briefs in support of a petition for reconsideration like that filed by the respondent, briefs are frequently filed and are always fully considered.



hearing. But the nature of its claim is nevertheless significant in answering the question whether it was accorded procedural due process. For in neither its petition to the Commission (R. 14-16) nor its notice of appeal (R. 1-6) did the respondent claim that it was unfairly treated in a procedural sense. What it in fact sought was an order directing "an immediate hearing on the question whether public interest requires operation of the Coastal Plains station at the cost of indirect modification of WJR's license" (R. 58). It did so on the theory that the Commission was wrong in holding that its allegations of modification were patently insubstantial as a matter of law; it charged not that the Commission unfairly reached that result but, rather, that it erroneously reached that result.

Respondent, as the licensee of Station WJR, Detroit, Michigan, operating as a Class I-A clear channel station on the frequency 760 kilocycles with a power of 50 kilowatts, petitioned the Commission to reconsider and set aside a grant of the application of intervenor-respondent, Coastal Plains, for a new station at Tarboro, North Carolina, operating daytime only on the 760 kilocycle channel. It based this request on two grounds. In the first place, it alleged that any action by the Commission on the Coastal Plains application during the pendency of the Commission's hearing and consideration of the Clear Channel proceed-

ing, Docket No. 6741,<sup>16</sup> was improper since as a result of this hearing the Commission might determine that station WJR, a clear channel station, could be granted increased power or additional protection to its present service area over and beyond the protection afforded by existing Commission rules. A grant of the Coastal Plains application, it was alleged, would prejudice any such determination in the Clear Channel hearing and, therefore, the respondent requested that the grant be set aside and the application be held in abeyance until after decision in the Clear Channel case. The respondent alleged as its second ground that the operation of the Coastal Plains station would cause objectionable interference to the existing service area of station WJR and would thereby deprive a number of listeners of WJR service. This allegation was accompanied by an affidavit by a qualified engineer setting forth the extent of the interference which it was calculated the operation of the Coastal Plains station in Tarboro would cause to WJR. On the basis of that alleged interference, the petition requested that the Commission set aside the grant to Coastal Plains and designate its application for hearing,

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<sup>16</sup> The Clear Channel hearing (Docket No. 6741) is a pending rule-making proceeding to determine whether changes in the rules governing assignment of stations on clear channels should be adopted. Among the issues in this proceeding is the question whether the maximum authorized power of Class I-A stations should be increased (R. 7).

with WJR as a party, to determine whether any grant of the Coastal Plains application which would result in such interference would be in the public interest.

An opposition to this petition was filed by Coastal Plains on October 18, 1946, together with an accompanying affidavit by its consulting engineer (R. 19-21). No reply to this opposition was filed by respondent.<sup>17</sup> After study of the pleadings, the Commission, on December 17, 1946, adopted and issued its decision and order denying the petition. This opinion was based on an assumption of the truth of the facts as alleged by the petitioner with respect to both the pending Clear Channel proceeding and the alleged interference which would be caused to its service by the operation of the Coastal Plains station. Accordingly, no question is presented here with respect to procedures that must be followed under the Due Process Clause with respect to the resolution of questions of fact. The Commission determined, however, that the facts alleged by the petitioner stated no valid legal grounds for granting the petition. It stated that the alleged interference to the WJR service, upon which appel-

<sup>17</sup> The Commission's Rules and Regulations do not expressly provide for the filing and consideration of replies to oppositions, but such replies are in fact frequently filed by the party making the original request, and in all such cases are fully considered by the Commission before it reaches any determination on the matter.



lant's request that the Coastal Plains application be designated for hearing was grounded; occurred in an area, outside the normally protected contours of station WJR, in which appellant was not entitled to protection from interference of other stations, and that therefore no grounds existed for designating the application for hearing with WJR as a party to determine the scope and extent of the alleged interference or whether as a consequence of such interference, the grant would be in the public interest. And, with respect to the respondent's contention that action on the Coastal Plains application should be delayed until the conclusion of the Clear Channel case, the Commission stated that it would not be in the public interest to set aside the grant and withhold action on an application which complied in every respect with the rules and regulations of the Commission because of the speculative possibility that the grant might affect the future assignment of facilities to WJR if the eventual decision on the Clear Channel proceeding resulted in a decision favorable to the respondent's claims (R. 26).

The court below agrees that the principal question with respect to the merits of respondent's claim of interference is whether or not respondent has suffered a modification of its license under the provisions of Section 312 (b) by reason of the grant to Coastal Plains (R. 42-43). Further, it agrees that in view of the decision of this Court in *Federal Communications Commission v. Na-*

*tional Broadcasting Company (KOA)*, 319 U. S. 239, "this is a question of law to be answered in terms of the Communications Act, the Commission's rules and standards, and pertinent judicial decisions" (R. 42). The decision of this Court in that case makes clear that the rights created by the grant of a license are defined by the rules and standards of the Commission which are substantially incorporated in the license.<sup>18</sup>

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<sup>18</sup> Any view that a hearing is required even though WJR is not entitled by the Commission's Rules and Regulations to protection from the interference it alleges, would impede the orderly exercise of the Commission's licensing functions under the Communications Act and the *KOA* decision, *supra*, 319 U. S. 239. For, since the signal of every station inevitably suffers some interference from the signals of other stations on the same and adjacent frequencies (see *National Broadcasting Company v. Federal Communications Commission*, 132 F. 2d 545, 548 (C. A. D. C.), affirmed, 319 U. S. 239), some rules are necessary to determine the kind of service which is of such poor quality as to warrant its disregard by the Commission in passing upon radio license applications. There are at present over 4,000 standard broadcast stations, and almost every new application for a station raises the possibility of some interference to the signal of an existing station. If the possibility of the existence of interference to the signal of an existing station, regardless of the quality and intensity of the signal, were held to be the basis of a right to a statutory hearing, it would result in an improper curtailment of the authority conferred on the Commission by Section 303 (f) of the Act to "make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act." These regulations would thus be denied relevance and applicability to the Commission's licensing functions. This would produce an utterly formless and indefinite standard, thus placing a difficult burden on the Commission and the courts in de-

The *KOA* case thus establishes that *WJR* is entitled to protection solely against Commission action resulting in objectionable interference under the rules. But when the Commission's Rules and Regulations are examined, it becomes apparent that the interference to the *WJR* service, alleged by respondent's petition, is not interference to any service which is afforded protection.

In the exercise of the rule-making powers conferred on the Commission by Section 303 (a), (b), (c), (d) and (f) of the Act, the Commission has, in Section 3.22 of its Rules, specified the classes and power of standard broadcast stations; in Section 3.21 of the Rules, specified the classes of standard broadcast channels; in Section 3.23 of the Rules, specified the time of operation of the several classes of stations; and in Section 3.25 of the Rules, designated particular frequencies as clear channels, to which Class I and Class II stations may be assigned. (See Appendix A, *infra*, pp. 49-50, 56-58).

Section 3.25 (a) of the Rules designates the frequency 760 kilocycles, on which *WJR* is located, as a channel on which there may be assigned one Class I station and one or more Class II stations operating limited time or daytime only.

termining, from case to case, what rights of a licensee are entitled to protection. These considerations serve to emphasize the wisdom of the decision of this Court in the *KOA* case that the Rules and Standards are to serve as the measure for determining whether an existing station is entitled to a hearing by reason of interference to its signal.



Section 3.28 (a) of the Rules provides that the individual assignment of stations to channels which may cause interference to other United States stations shall only be made in accordance with the Commission's *Standards of Good Engineering Practice Concerning Standard Broadcast Stations* for the respective class of stations involved (see Appendix A, *infra*, pp. 58-59). While Sections 3.21 and 3.22 of the Rules provide that the primary or daytime groundwave service of a Class I station shall be free from objectionable interference, Section 3.22 makes clear that this protection shall be afforded in accordance with the *Standards*.

The *Standards* state expressly that "during daytime the Class I station is protected to the 100 uv/m ground wave contour".<sup>19</sup> (See Appendix A, *infra*, pp. 59-60). That this is the maximum protection afforded is further established by Table IV of the *Standards of Good Engineering Practice*.

"This determination that protection for Class I stations beyond the 100 microvolts per meter contour would not be in the public interest was made in 1939 after a formal hearing from June 6 to June 30, 1938, and an informal hearing from June 5 to June 6, 1939, at which 45 representatives of broadcast equipment manufacturers, networks, broadcast associations and consulting engineers were present. *Fifth Annual Report of the Federal Communications Commission* (1939) pp. 37-42. The social, economic, and engineering problems in connection with that determination were considered at great length. *Report on Proposed Rules Governing Standard Broadcast Stations and Standards of Good Engineering*, Docket No. 5072A, dated January 18, 1939.

*Concerning Standard Broadcast Stations.* But no interference within the 100 microvolt contour of WJR will result from the operation of Coastal Plains. On the contrary, in an engineering affidavit filed with its petition for Reconsideration and Hearing before the Commission, the respondent admitted that in the area in which it claims interference, WJR lays down a signal averaging only 32 microvolts per meter or less during daytime hours (R. 17).

Thus the Standards make clear that WJR is not entitled to protection against the interference it alleges will be caused to its groundwave signal in the daytime by reason of the operation of Coastal Plains.

The Commission's Rules (1.382, 1.390, Appendix A, *infra*, pp. 53, 54-56), governing grants without hearing and designation of applications for hearing, reveal that an existing station is not entitled to a hearing on a new application where it alleges that a grant of that application would cause interference to it outside its normally protected contour, as prescribed by the applicable Rules. But that is exactly what respondent alleged in its petition for rehearing of the Coastal Plains grant. Under these circumstances if respondent had been afforded oral argument, the only significant contentions it could have made were either that the facts are otherwise than as alleged in its pleading or

that the rules and *Standards* do not mean what they so obviously say.<sup>20</sup> But it is no denial of due process for the Commission to take at face value a party's own pleadings and the well-established meaning of its rules.<sup>21</sup> The Commission, therefore, in disposing of respondent's petition, said (R. 26):

<sup>20</sup> See *Marysville-Yuba City Broadcasters, Inc.*, 8 F. C. C. 83 (1940); cf. *Wescoast Broadcasting Company (KPQ)*, 9 F. C. C. 50 (1941); *Queen City Broadcasting Co., Inc.* (decided Dec. 16, 1946), 3 Pike and Fischer *Radio Regulation*, p. 657.

<sup>21</sup> In his dissent, Judge Prettyman observes (R. 66-67):

"The point upon which we [the minority] differ is elusive and difficult to pin down, but it is exceedingly simple. Perhaps if we visualize a proceeding we will make it clear. A case to which A and B are parties is pending before some tribunal. An outsider, M, appears and files a paper in which he asks to be made a party. But he does not allege any fact which shows that he has any interest in the case, or that he would be affected by it, or even raises any substantial question in that respect. My view is that such an unsupported request can be denied without an oral argument. The court says that the Constitution requires that he have oral argument, in order that he may have a chance to persuade the tribunal that he has an interest despite his allegations. In its practical effect, the court requires that every petition for intervention be set for oral hearing, no matter what the petition says or fails to say. I say that tribunals have some measure of leeway to dispose of such petitions without hearing, if they do not even raise a substantial question as to the petitioner's interest. In its theoretical concept, the court seems to hold that the Constitution protects all pleaders against stupidity, laziness or ineptness with the written word. My view is that the Constitution requires him who wants to participate in a pending case to exert at least a modicum of effort and to indicate in writing at least some shadow of factual ground for his prayer."



Station WJR is a Class I-A station. Under the Commission's Rules and Standards; Class I-A stations are normally protected daytime to the 100 microvolt-per-meter contour. The area sought by petitioner to be protected is, according to the engineering affidavit accompanying the petition, served by Station WJR during the daytime with a signal intensity of 32 microvolts-per-meter or less, and is therefore outside the normally protected contour.

Under these circumstances, since no interest of WJR entitled to protection was affected by the grant to Coastal Plains, respondent's request for a statutory hearing was completely and patently without merit.

Despite its enunciation of general principles as to the necessity for oral argument on all legal issues presented for decision by an agency, the court below was able both to pass on and uphold on its merits the Commission's disposition of the respondent's request that action on the Coastal Plains application be deferred altogether until after a decision in the Clear Channel hearing (R. 41). Yet no oral argument had been held on that claim.

The fact that the Commission's denial of respondent's request based on the interference ground was a final disposition of that claim as a result of which respondent was "disabled on the merits to proceed further" before the Commission (R. 50) no more presents due process difficulties than does

the denial of respondent's request based on the Clear Channel hearing ground. For respondent was able to present the one determination as well as the other for the examination of a reviewing court by availing itself of the judicial review provisions of Section 402 (b) of the Communications Act. This availability of judicial review affords a safeguard, sufficient for constitutional purposes, against a possibly erroneous interpretation of the statute and the rules and regulations. Cf. *Bowles v. Willingham*, 321 U. S. 503, 520; *Bourjois, Inc. v. Chapman*, 301 U. S. 183, 189; *Phillips v. Commissioner*, 283 U. S. 589, 596-599; *Nickey v. Mississippi*, 292 U. S. 393, 396; *Security Trust Co. v. Lexington*, 203 U. S. 323, 333. And the decision of the court below on the untenability of respondent's claim based on the pendency of the Clear Channel hearing is itself illustrative of the manner in which judicial review may be available where an agency rejects a claim for relief as entirely unwarranted as a matter of law.

An explanation which finds confirmation in the opinion below discloses the reason for the fact that while the lack of oral argument offered no barrier to decision by the court below on the Clear Channel claim of respondent and its denial by the Commission, the court found that, although, following the same procedure, the Commission could not deny the claim that, because of interference to it, the Coastal grant should be set aside and the application set down for a full hearing in which it

could participate. This explanation is that the court below had been able to reach the conclusion that respondent's interest as a future applicant for increased power was not such a substantial interest that the Due Process Clause requires an oral hearing on a claim of impairment of that interest; but that respondent's interest as an existing licensee was so substantial an interest that the Due Process Clause required such a hearing on a claim of interference with that interest. This second proposition is, indeed, expressly stated in the opinion below. The first is not spelled out, but is implicit in the discussion in Point I of the opinion (R. 41). If this explanation for the court's ability to pass on the merits of the Clear Channel issue is correct, it is obvious enough that by its own actions the court below, while stating otherwise, is implicitly agreeing that some issues may be disposed of without prior oral argument, and that request for relief may in particular circumstances be denied because the interest asserted and the claim for protection to it are found to be too flimsy to warrant the affording of the relief sought.

The court below did not hold that respondent was entitled to the hearing provided by Section 312 (b) on whether its license should be modified. It held that respondent was entitled to a preliminary hearing on the question whether the allegations of its petition showed, as a matter of



law, that the proposed action of the Commission would constitute a modification of respondent's license requiring a prior hearing under Section 312 (b). It held that respondent was entitled to such a preliminary hearing even in the absence of an allegation of interference within the normally protected contour of respondent. In holding that, under these circumstances, respondent was entitled to such a preliminary hearing, the court has in effect held that because of the nature of the interest asserted, any claim of "interference" with that interest requires the holding of a hearing to ascertain the substantiality of the claim. But in equating electrical interference as such, even where it occurs outside of protected contours, with impairment of the rights in a license, the court below looks to sources other than the applicable provisions of the Communications Act and the Commission's Rules and Standards as the measure of the nature and extent of the rights conferred by a radio station license and the protection which they are afforded. For, it has broadly assumed that a radio station license confers a property right in its owner, that "the impairment of such a license right by the granting of conflicting facilities to another station is therefore *pro tanto* a deprivation of property" (R. 46), and that for this reason the Due Process

Clause requires a hearing.<sup>22</sup> However, the use of an undefined concept of "property" rights in a license and of "conflict" with these rights by electrical interference from a new station, in areas outside the protected contours of the existing station serves to obliterate existing law as to the nature and extent of the rights conferred

<sup>22</sup> These views were reiterated in the decision below in the terms in which they were stated by the same court in the case of *L. B. Wilson v. Federal Communications Commission*, 170 F. 2d 793, 802 (C. A. D. C.), where the court stated: "As has been said above, a broadcasting license confers a property right on its owner, although a limited and defeasible one. The impairment of such a right by the granting of conflicting facilities to another station is, therefore, *pro tanto* a deprivation of property. The due process clause of the Fifth Amendment provides that no person shall be deprived of life, liberty or property without due process of law. An essential element of due process is an opportunity to be heard before the reaching of a judgment."

In the *Wilson* case these views were not necessary for the decision. For, in that case, as well as the companion case of *WJR v. Federal Communications Commission (Southeastern Broadcasting Co., Intervenor)*, (C. A. D. C.), decided October 7, 1948, 4 Pike and Fischer, *Radio Regulation*, p. 2081, which were reargued together with the instant case in the court below on June 11 and 12, 1947, the interference to the existing licensees, which it was alleged would result from the new grants, was within the normally protected contours of the existing stations as defined by the Commission's Rules and Standards. And, therefore, on the basis of the factual allegations of "objectionable interference" within protected contours, the licensees were entitled to a hearing under the ruling of this Court in *Federal Communications Commission v. National Broadcasting Company (KQA)*, 319 U. S. 239.

by a license, found in the Communications Act and decisions of this Court, and to substitute for its concepts which have been rejected by this Court. The Communications Act of 1934 and decisions of this Court make it clear that the grant of a license does not confer rights of property in a licensee.<sup>23</sup> Moreover, vague and undefined use of the term "conflict" serves to substitute ambiguities of undefined language for the provisions of Section 312 (b) of the Communications Act, the Rules and Standards promulgated by the Commission, and the decision of this Court in the case of *Federal Communications Commission v. National Broadcasting Company (KOA)*, 319 U. S. 239, as the measure of the rights of an existing licensee and the extent of protection against threatened impairment.

The real issue in this case is whether the respondent was accorded a fair opportunity to present its position to the Commission. The respondent did not complain of unfairness and his substantive claim, as we have shown, may fairly be characterized as frivolous. The dissenters below correctly and explicitly ruled that the respond-

<sup>23</sup> See Sections 301, 304, 307 (d), and 309 (b) of the Communications Act. *Ashbacker Radio Co. v. Federal Communications Commission*, 326 U. S. 327, 331; *Federal Communications Commission v. Sanders Radio Station*, 309 U. S. 470, 475: "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."



ent's contentions were entirely unsubstantial and that the Commission did all that it was required to do under the circumstances. Their view and the Government's is that the hearing required by the Due Process Clause is only such as is "appropriate to the nature of the case upon which such officers are required to act." *The Japanese Immigrant Case*, 189 U. S. 86, 101. In this case, the hearing accorded the respondent was adequate in the face of its frivolous claim.

The fact that the provisions of the Communications Act, the Rules and Standards of the Commission, and prior relevant decisions of this Court must be consulted in order to determine the unsubstantiality of respondent's petition in the light of the undisputed facts which it presents, does not of itself require that the Commission must hold an oral argument in order to ensure that these processes of legal reasoning are adequately performed. What can be clearly read and interpreted is not rendered doubtful or obscure by the fact that it takes time to read the relevant material or that it may require the cross-referencing of that material to give it full meaning and significance.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

PHILIP B. PERLMAN,

*Solicitor General.*

STANLEY M. SILVERBERG,

*Special Assistant to the Attorney General.*

BENEDICT P. COTTONE,

*General Counsel,*

MAX GOLDMAN,

*Assistant General Counsel,*

RICHARD A. SOLOMON,

PAUL DOBIN,

*Counsel,*

*Federal Communications Commission.*

APRIL, 1949.

## APPENDIX B

There is set out in full in this Appendix the correspondence between the Solicitor General and various Governmental agencies with respect to the decision of the Court below in this case.

1. The letter of the Solicitor General, dated February 3, 1949, is as follows:

On October 7, 1948, the Court of Appeals for the District of Columbia rendered a decision in the case of *WJR, The Goodwill Station, Inc. v. Federal Communications Commission*, setting aside an order of the Federal Communications Commission on the ground that it had not afforded the petitioner a fair hearing. The Federal Communications Commission had without argument dismissed a petition for relief because on its face the petition shows that it did not state grounds for relief under the governing regulation. The Court of Appeals held, however, that

“due process of law, as guaranteed by the Fifth Amendment, requires a hearing, including an opportunity to make oral argument, on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite*, for temporary injunctions and the like.”

In view of the importance of the decision in imposing a constitutional requirement that oral argument be held on questions of law, irrespective of how meritless an application might be on its face, before an agency disposes of pending proceedings on



the basis of the resolution of such issues of law, the Government has filed a petition for writ of certiorari in this case. A copy of the opinion and the Government's petition are enclosed.

The case is obviously important for all administrative agencies. It would be most helpful in the preparation of the Government's brief if you would advise us of the practice of your agency in similar situations, and of the potential effect of the decision of the Court of Appeals upon your agency. In particular, does the agency dismiss petitions or applications insufficient on their face as a matter of law without allowing oral argument? If so, does it permit the filing of briefs in support of the petition or application before the dismissal? If so, does it do this by specific rule or regulation or just as a matter of practice? Would requiring argument on such petitions or applications impose any substantial burden upon the agency or impede the performance of its duties?

I would appreciate a statement from you as to these matters as promptly as possible.

Sincerely yours,

PHILIP B. PERLMAN,  
*Solicitor General.*

2. The following replies were received:

UNITED STATES DEPARTMENT  
OF AGRICULTURE,  
OFFICE OF THE SOLICITOR,  
Washington, D. C., Mar. 7, 1949.

*The Solicitor General,  
Department of Justice.*

DEAR MR. SOLICITOR GENERAL: This is in reply to your letter of February 3, 1949, in which you

## APPENDIX A

COMMUNICATIONS ACT OF 1934, 48 STAT. 1064, AS  
AMENDED, 47 U. S. C. 151, ET SEQ.

### Title III—Special Provisions Relating to Radio *License for Radio Communication or Transmis- sion of Energy*

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or

refer to the recent decision of the Circuit Court of Appeals for the District of Columbia in the case of *WJR, the Goodwill Station, Inc. v. Federal Communications Commission*, reserving an order of the Commission on the ground that the petitioner had not been granted a fair hearing. It appears that the Commission, without hearing argument, dismissed the appellant's petition because it did not, on its face, contain allegations which would entitle the petitioner to the relief sought. The court held that the failure to grant the petitioner an opportunity to present oral argument on the question of whether the petition was legally sufficient constituted a denial of due process of law.

You desire to know (1) whether this Department dismisses petitions or applications which it deems legally insufficient without allowing oral argument, (2) whether, in such cases, we permit the filing of briefs in support of the petition or application, (3) whether our procedure in these respects is governed by specific rules or is a matter of departmental practice, and (4) whether a requirement that oral argument be permitted on all such petitions or applications would impose any substantial burden upon this Department or impede the performance of its duties.

As you are doubtless aware, there are numerous statutes administered by this Department under which administrative proceedings are authorized. The decision in the *Goodwill Station* case arose out of a petition for intervention in a proceeding whereby a third party sought and had been granted a license to construct a broadcasting station. Analogous situations might arise in this Department under applications to amend rates under the Packers and Stockyards Act, petitions by milk handlers to modify or be exempt from orders issued under the Agricultural Marketing



when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

\* \* \* \* \*

### *General Powers of Commission*

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

\* \* \* \* \*

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the pro-

visions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with.

\* \* \* \* \*

#### *Waiver by Licensee*

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

\* \* \* \* \*

#### *Allocation of Facilities; Term of Licenses*

SEC. 307. (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to

the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

*Hearings on Applications for Licenses; Form of Licenses; Conditions Attached to Licenses*

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.



(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

\* \* \* \*

### *Revocation of Licenses*

SEC. 312. (b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

\* \* \* \*

### *Proceedings to Enforce or Set Aside the Commission's Orders—Appeal in Certain Cases*

SEC. 402. (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

#### **RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION**

**SEC. 1.382. *Grants without a hearing.***—(a) Where an application for radio facilities is proper upon its face and where it appears from an examination of the application and supporting data that (a) the applicant is legally, technically and financially qualified; (b) a grant of the application would not involve modification, revocation, or non-renewal of any existing license or outstanding construction permit; (c) a grant of the application would not cause additional electrical interference to an existing station or station for which a construction permit is outstanding within its normally protected contour as prescribed by the applicable Rules and Regulations; (d) a grant of the application would not preclude the grant of any mutually exclusive application; and (e) a grant of the application would be in the public interest, the Commission will grant the application without a hearing.

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the Commission will not consider any other application as being mutually exclusive with the application under consideration unless such other application was substantially complete and was tendered for filing with the Commission not later than the close of business on the day preceding the day on which the Commission takes action with respect to the application under consideration [11 F. R. 891, 177A-416, 13974; 13 F. R. 660].

SEC. 1.390. *Petitions for reconsideration or for rehearing.*—(a) Where an application has been granted without a hearing, any person aggrieved or whose interests would be adversely affected thereby may file a petition for reconsideration of such action. Such petition must be filed with the Commission within 20 days after public notice is given of the Commission's action in granting the application. Such petition will be granted if the petitioner shows that:

(1) Petitioner is an existing licensee or permittee and a grant of the application would require the modification, revocation, or non-renewal of his license or construction permit; or

(2) That petitioner is an existing licensee or permittee and a grant of the application would cause interference to his station within the normally protected contour as prescribed by applicable Rules and Regulations; or

(3) At the time the application was granted, petitioner had a mutually exclusive application pending before the Commission; or

(4) A grant of the application is not in the public interest.



(b) Where an application has been granted or denied after hearing, petitions for rehearing may be filed within 20 days after public notice is given of the Commission's action in granting or denying the application. Petitions for rehearing by persons not parties to the Commission's hearing will not be granted unless good cause is shown as to why it was not possible for such person to participate earlier in the Commission's proceeding.

(c) Where a petition for reconsideration or for rehearing is based upon a claim of electrical interference within the normally protected contour of an existing station or a station for which a construction permit is outstanding, such petition must be accompanied by an affidavit of a qualified radio engineer which shall show either by reference to the Commission's Standards of Good Engineering Practice or to actual measurements made in accordance with the methods prescribed by the Commission's Standards of Good Engineering Practice that electrical interference will be caused to the station within its normally protected contour. If the claim of interference is not based upon actual measurements made in accordance with the Standards of Good Engineering Practice, it may be controverted by affidavit containing results of actual measurements made in accordance with the Standards of Good Engineering Practice.

(d) Any opposition to a petition for reconsideration or rehearing may be filed within 10 days after the filing of such petition.

(e) Petitions for reconsideration or rehearing filed under this section may request (1) reconsideration, either in cases decided after hearing or

in cases of applications granted without hearing; (2) reargument; (3) reopening of the proceeding; (4) amendment of any finding; or (5) such other relief as may be appropriate. Such petition shall state specifically the form of relief sought and, subject to this requirement, may contain alternative requests. Each such petition shall state with particularity in what respect the decision, order or requirement or any matter determined therein is claimed to be unjust, unwarranted, or erroneous, and with respect to any finding of fact must specify the pages of record relied on. Where the petition is based upon a claim of newly discovered evidence, it must be accompanied by a verified statement of the facts relied upon, together with the facts relied on to show that the petitioner, with due diligence, could not have known or discovered such facts at the time of the hearing.

(f) The filing of a petition for reconsideration or rehearing shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof. However, upon good cause shown the Commission may stay the effectiveness of its order or requirement pending a decision on the petition for rehearing. [11 F. R. 177A-417.]

\* \* \* \* \*

SEC. 3.21. *Three classes of standard broadcast channel.*—(a) *Clear Channel.*—A “clear channel” is one on which the dominant station or stations render service over wide areas and which are cleared of objectionable interference, within their

primary service areas and over all or a substantial portion of their secondary service areas. [4 F. R. 2715.]

SEC. 3.22. *Classes and power of standard broadcast stations.*—(a) *Class I station.*—A “Class I Station” is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in Sec. 3.25 or in accordance with the “Engineering Standards of Allocation.” The operating power shall be not less than 10 kw nor more than 50 kw (also see Sec. 3.25 (a) for further power limitation).

(b) *Class II station.* A “Class II Station” is a secondary station which operates on a clear channel (see Sec. 3.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from Class I stations. A station of this class shall operate with power not less than 0.25 kilowatts nor more than 50 kilowatts. Whenever necessary a Class II station shall use a directional antenna or other means to avoid interference with Class I stations and with other Class II stations, in accordance with the “Engineering Standards of Allocation.” [4 F. R. 2715.]



**SEC. 3.23 Time of operation of the several classes of stations.**—The several classes of standard broadcast stations may be licensed to operate in accordance with the following:

(a) "Unlimited time" permits operation without a maximum limit as to time.

(b) "Limited time" is applicable to Class II (secondary stations) operating on a clear channel only. It permits operation of the secondary station during daytime, and until local sunset if located west of the dominant station on the channel, or if located east thereof, until sunset at the dominant station, and in addition during night hours, if any, not used by the dominant station or stations on the channel. [4 F. R. 2716.]

\* \* \* \* \*

**SEC. 3.25 Clear Channels; Class I and II stations.**—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 750, 760, 770, 780, 820, 830, 840, 870, 880, 890, 1020, 1040, 1100, 1120, 1160, 1180, 1200, and 1210 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kilowatts. [4 F. R. 2716, 5 F. R. 3670, 6 F. R. 2544.]

\* \* \* \* \*

**SEC. 3.28 Assignment of station to channels.**—

(a) The individual assignments of stations to channels which may cause interference to other

United States stations only, shall be made in accordance with the standards of good engineering practice prescribed and published from time to time by the Commission for the respective classes of stations involved. (For determining objectionable interference see "Engineering Standards of Allocation" and "Field Intensity Measurements in Allocation," Sec. C.) [4 F. R. 2716, 5 F. R. 3670.]

**STANDARDS OF GOOD ENGINEERING PRACTICE CONCERNING STANDARD BROADCAST STATIONS (550-1600 KC)**

(4 F. R. 2862)

**1. Engineering Standards of Allocation.**

(2) From an engineering point of view, Class I stations may be divided into two groups:

(a) The Class I stations in Group I are those assigned to the channels allocated by Section 3.25, paragraph (a), on which duplicate nighttime operation is not permitted, that is, no other station is permitted to operate on a channel with a Class I station of this group within the limits of the United States (the Class II stations assigned the channels operate limited time or daytime only), and during daytime the Class I station is protected to the 100 uv/m ground wave contour. Protection is given this class of station to the 500 uv/m ground wave contour from adjacent channel stations for both day and nighttime operations. The power of each Class I station shall not be less than 50 kw.

<sup>1</sup> See Tables IV and V.

Extracts from Table IV (4 F. R. 2865)—Protected service contours and permissible interference signals for broadcast stations

Class of Station	Class of channel used	Permissible power	Signal intensity contour of area protected from objectionable interference <sup>1</sup>		Permissible interference signal <sup>2</sup> on same channel	
			Day <sup>3</sup>	Night	Day <sup>3</sup>	Night <sup>4</sup>
Ia	Clear	50 kw	SC 100 uv/m AC 500 uv/m	Not duplicated	5 uv/m	Not duplicated

<sup>1</sup> When it is shown that primary service is rendered by any of the above classes of stations, beyond the normally protected contour, and when primary service to approximately 90 percent of the population (population served with adequate signal) of the area between the normally protected contour and the contour to which such station actually serves, is not supplied by any other station or stations, the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration. When a station is already limited by interference from other stations to a contour of higher value than that normally protected for its class, this contour shall be the established standard for such station with respect to interference from all other stations.

<sup>2</sup> For adjacent channels see Table II.

<sup>3</sup> Groundwave.

<sup>4</sup> Skywave field intensity for 10 percent or more of the time.



Agreement Act,<sup>2</sup> complaints under the Commodity Exchange Act<sup>3</sup>, whereby a contract market seeks to exclude a cooperative association from membership in such market, and petitions by third parties to intervene in any such proceedings or in disciplinary (accusatory) proceedings under the Commodity Exchange Act, the Packers and Stockyards Act, the Perishable Agricultural Commodities Act,<sup>4</sup> and various other acts.

1. While this Department generally grants a request for oral argument in support of a petition, application or complaint in any of the above described situations, such petitions, applications, or complaints are, upon occasion, dismissed without permitting oral argument. Such dismissals are based upon a determination that the pleading is legally insufficient, upon its face, to entitle the petitioner to the requested relief.

2. A request that the petitioner be allowed to file a brief in support of his pleading is also generally allowed. However, the petition or application may be and sometimes is dismissed or decided adversely to the petitioner, on the ground of legal insufficiency, without either brief or oral argument, except in proceedings under the Agricultural Marketing Agreement Act as above described, where the rules require that the petitioner be notified of the Government's intention to dismiss and be given an opportunity to file a memorandum of law in support of his petition.

3. As above indicated, our rules of practice make no provision for oral argument or, with the single exception above noted, for the submission of briefs in support of any petition, application or complaint in the above described cases. The granting of requests to brief and argue such

<sup>2</sup> 7 U. S. C. 601 *et seq.*

<sup>3</sup> 7 U. S. C. 1-17a.

<sup>4</sup> 7 U. S. C. 499a-499r.

petitions or motions is, accordingly, a matter of practice rather than requirement.

The situations above described are those most closely analogous to the facts before the court in the *Goodwill Station* case. These are situations wherein private persons seek to initiate action before a Government body in an effort to obtain some right or privilege. However, the court's language, as exemplified by the quoted portion thereof in your letter, would seem to be sufficiently broad to encompass the reverse situation—where the Government is taking the initiative in an effort to deprive a person of some right or privilege. So interpreted, the court's decision would apply to any motion by a respondent to dismiss a proceeding on the ground that a complaint issued by this Department does not state a cause of action. Our practice with respect to such motions then becomes pertinent to your inquiry.

This Department generally grants a request for oral argument or to permit the filing of briefs in support of a motion to dismiss a complaint. However, such motions may be and sometimes are dismissed without permitting either oral argument or the filing of briefs, upon a determination by the hearing examiner that the motion discloses no basis in law for the relief asked by the moving party. The rules of practice provide that a respondent or party may, at his option, present briefs and argue orally at some stage prior to the final determination of the proceeding. Generally, this requirement is reflected in a provision that briefs and oral argument be permitted in support of exceptions to the report of the hearing officer. There is no right under these rules to submit briefs or argue at any particular stage prior to final determination, in support of any such motion.<sup>5</sup> On the contrary, the rules

<sup>5</sup> In a decision and order entered February 2, 1949, with reference to certain questions certified by the hearing officer, the

state specifically that the hearing officer may refuse oral argument on any point if such refusal will not deprive the party of an opportunity to argue orally later in the proceeding.

4. If the requirement that oral argument must be permitted relates only to petitions or applications the denial of which will result in dismissal of the case or exclusion of the petitioner as a participant, it is the opinion of this Department that such requirement would not impose a substantial burden, although it would undoubtedly result in some increase in the volume of work and in the time necessary for the disposition of proceedings. We have encountered little difficulty heretofore as a result of our liberal policy with respect to the granting of oral argument on such petitions, probably because of the fact that petitioners know that the granting of such requests is discretionary, and are therefore inclined to present them only when a reasonable basis exists. If oral argument were made a matter of right, without any necessity for the requesting party to show a reasonable basis, we believe that the number of such requests would increase considerably. In addition, there is a very real likelihood that such a requirement would, in some cases, be used as a delaying tactic. In such situations it would result in preventing prompt disposition of the proceeding.

If the requirement that oral argument must be permitted relates to all motions, petitions or applications other than those of an interlocutory nature, it is the opinion of this Department that

Judicial Officer of the Department, acting for the Secretary, held that "It does not appear to be a requirement of due process of law under the Fifth Amendment that a respondent in an administrative proceeding be afforded an opportunity to test the validity of a complaint and to get a decision upon the validity prior to a hearing upon the merits."



the requirement would open a fertile field for unjustifiable delay; impose a substantial burden upon the Department, and impede the Department in the performance of its duties.

Sincerely yours,

W. CARROLL HUNTER,  
Solicitor.

UNITED STATES  
DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SOLICITOR,  
Washington 25, D. C., Feb. 9, 1949.

Hon. PHILIP B. PERLMAN,  
Solicitor General,  
Department of Justice,  
Washington 25, D. C.

DEAR MR. PERLMAN: This responds to your letter of February 3 concerning the case of *WJR, The Goodwill Station, Inc. v. Federal Communications Commission* (D. J. File No. 82-38).

As the Department of the Interior is not, generally speaking, a regulatory agency, the impact of the decision rendered in this case by the United States Court of Appeals, District of Columbia Circuit, would be less serious upon the operations of this Department than upon the operations of agencies whose work is wholly or largely regulatory in character. However, there are two classes of proceedings in the Department of the Interior which seem to be within the ambit of this decision. I refer to contests over interests in the public lands of the United States and to Indian probate proceedings.

The departmental regulations governing the conduct of public-land contests are found in 43 CFR, Part 221. The particular point involved in the *WJR* case might arise in one of these pro-

ceedings as a result of the disposition without a hearing of an application to institute a contest (see 43 CFR 221.1-221.5 of or a motion for a new trial (see 43 CFR 221.42-221.45). It is customary for such an application or motion to be denied without a hearing when it shows plainly on its face that the person submitting the application or motion does not have a legal basis for the relief sought by him.

The departmental regulations governing Indian probate proceedings are set forth in 25 CFR, 1947 Supp., Part 81. The point involved in the *WJR* case might arise in connection with one of these proceedings upon the disposition without a hearing of a petition for rehearing (see 25 CFR, 1947 Supp., 81.17) or for reopening (see 25 CFR, 1947 Supp., 81.18). It is not customary to grant a hearing on a petition which fails to allege adequate grounds for the relief sought by the petitioner.

Proceedings of the two classes mentioned above are rather numerous (although in the over-all picture they constitute a relatively small part of the work of the Department of the Interior as a whole). Because of the chronic shortage of personnel which has long plagued this Department, only small staffs are available to handle these proceedings, and delays in the disposition of the cases are all too common. If it were established as a principle of constitutional law that each person who submits an application to contest or a motion for new trial or a petition for rehearing or reopening must be granted a hearing, irrespective of the deficiencies of the application or motion or petition, the adverse effect upon the small number of personnel handling these types of proceedings would be serious. It would certainly be necessary for the Congress to provide funds with

which to enlarge the small staffs engaged in these lines of work.

Sincerely yours.

Mastin G. White,  
MASTIN G. WHITE,  
Solicitor.

INTERSTATE COMMERCE COMMISSION,  
OFFICE OF THE CHIEF COUNSEL,  
Washington 25, February 11, 1949.

Honorable PHILIP B. PERLMAN,  
Solicitor General, Department of Justice,  
Washington 25, D. C.

MY DEAR MR. SOLICITOR GENERAL: I have your letter of February 3, 1949, in reference to petition for writ of certiorari to the Court of Appeals of the District of Columbia in *WJR, The Goodwill Station, Inc. v. Federal Communications Commission*. I have read the decision of the Court and the accompanying petition, both of which you enclosed with your letter.

Judge Stephens' opinion has a broad sweep and will undoubtedly slow down the functioning of the Interstate Commerce Commission if it is to be required in every adversary proceeding, to accord parties the right to oral argument as an indispensable ingredient of due process.

You inquire (1) of the practice of the agency in similar situations; (2) the potential effect of the decision upon this agency.

As to (1), I am unable to point out any practice under the Interstate Commerce Act which might be said to parallel the facts upon which the Court of Appeals' decision is based. It has been the almost invariable practice of this Commission in proceedings of any importance to accord to the parties opportunity to present their contentions either by way of adduction of testimony or the presentation of argument. Of course many



so-called formal cases are submitted to the Commission upon briefs alone, nevertheless when request has been made for oral argument either before a division or the Commission as a whole such request is granted. Our rules of practice do not specifically provide for rulings on questions raised by way of demurrer or as if on demurrer.

On the other hand the broad basis upon which the decision rests might bring into question the practice of this agency in administering several sections of its organic law. Those sections of the Interstate Commerce Act dealing with the filing of complaints, sections 13 (1), 204 (c), 304 (e), 406 (a), provide that the Commission shall investigate the matters complained of "if there shall appear any reasonable ground for investigating said complaint" (Sec. 13 (1), 406 (a), or if "the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint" (Sec. 204 (a), 304 (e)). It would appear that before the Commission's machinery is set in motion it must determine preliminarily that the complaint alleges reasonable grounds. While I cannot refer you to any particular case where the Commission has dismissed a complaint at this preliminary stage it would obviously place a severe burden on it to have to accord oral argument upon the question of whether a complaint states reasonable ground for relief. In any event a complainant has protection from arbitrary action by way of judicial review.

There are a great many matters both *ex parte* and adversary which the Commission determines without recourse to formal hearing, briefs or oral argument.

Many 4th section cases (long and short-haul clause) are decided upon petition and protest. Only those cases which are of such importance

or difficulty as to require formal hearing are so treated.

In section 5 cases (combinations and consolidations of carriers) public hearing is required by the Act only in cases where railroads are involved or "if the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made." Many cases of this kind are decided in the face of formal protest, without hearing or oral argument. The same situation obtains with respect to applications for approval of the issuance of securities or assumption of indebtedness (section 20a).

Sections 206 (b), 209 (b), 309 (a) (g), 410 (c), dealing with the issuance of certificates of public convenience and necessity, and permits, do not require hearing. In such cases a common practice is for the Commission to act without hearing, based upon field investigation or upon the showing of the application itself, and this may even be done when formal protest has been made.

On questions of interventions in pending proceedings the Commission has not, to my knowledge, ever denied such right, but it has usually allowed such interventions upon condition that the issues be not broadened thereby.

I may observe generally that in all matters coming before it no matter under which provisions of the Act, where the issues have been of any conceivable importance or the rights of interested parties have been substantially involved, this Commission has been at pains to accord every opportunity to the parties to present their contentions fully by way of hearing, briefs and argument.

As above indicated the Commission performs many functions with respect to which public interest requires promptness of action. To give effect to the decision in question to the extent its language seems to warrant might not only serve

to defeat the purpose of the Act itself but obviously would place a severe burden upon this agency from the standpoint of time, personnel and expense.

Sincerely yours,

Daniel W. Knowlton,  
DANIEL W. KNOWLTON,  
Chief Counsel.

DEPARTMENT OF LABOR,  
OFFICE OF THE SOLICITOR,  
Washington 25, March 1, 1949.

The Honorable PHILIP B. PERLMAN,  
*The Solicitor General,*  
*Department of Justice,*  
*Washington 25, D. C.*

MY DEAR MR. SOLICITOR GENERAL. This is in reference to your letter of February 3, 1949 in which you presented certain questions as to the effect of the decision of the Court of Appeals for the District of Columbia in the case of *WJR v. Federal Communications Commission* on administrative legal functions of this Department. You pointed out in your letter that the decision holds that due process of law requires that oral argument be held on questions of law, irrespective of how meritless an application might be on its face, before an agency disposes of pending proceedings on the basis of the resolution of such issues of law, and you asked that I advise you as to the practices of this Department in similar situations.

After an analysis of the various administrative legal functions of the Department of Labor, under the statutes administered in the Department, it appears very unlikely that any question such as that presented in the *WJR* case might arise in connection with these functions. The regulations



and rules of practice which govern the administrative functions of the Department provide for adequate opportunity for oral hearing in all situations where an adjudication of property rights is involved.

Very truly yours,

William S. Tyson,  
WILLIAM S. TYSON,  
*Solicitor of Labor.*

NATIONAL LABOR RELATIONS BOARD,  
Washington 25, D. C., March 3, 1949.

Honorable PHILIP B. PERLMAN,  
*Solicitor General, Department of Justice,*  
*Washington, D. C.*

Re: *Federal Communications Commission v. WJR, The Goodwill Station, Inc.*, Supreme Court No. 495, October Term, 1948

DEAR MR. PERLMAN: We have your letter of February 3, 1949, inquiring as to the Board's practice respecting oral arguments and the effect which the rule applied by the Court of Appeals for the District of Columbia in the above case would have on the Board's work were that decision to be affirmed by the Supreme Court.

The number of cases which come before the Board is so great that it would be physically impossible for the Board to comply with the rule enunciated by the Court of Appeals for the District of Columbia. During the fiscal year July 1947 to June 1948, the Board received 36,735 new cases (Thirteenth Annual Report of the National Labor Relations Board, Gov't Print. Off., 1949, p. 96). The Board has always followed the practice of granting oral argument in only a limited number of cases. It has never believed that it was required by either the Constitution or

applicable statutes to hear oral argument in all cases which presented a substantial issue of law or fact.

The Board's Rules and Regulations, Series 5, as amended August 18, 1948 (12 Fed. R. 5656, 13 Fed. Reg. 4872, 14 Fed. Reg. 78) provide that in unfair labor practice cases arising under Section 8 of the National Labor Relations Act, as amended, after the issuance of an intermediate report following a hearing before a trial examiner, if the parties have filed exceptions thereto they may request oral argument within 10 days after the date of service of the order transferring the case to the Board (Rules and Regulations, Section 102.46 (c)). In the accompanying Statement of Procedure (Section 101.11 (c)) the Board stated that in such cases "Oral argument is very frequently granted." However, the decision as to whether or not to grant oral argument is not necessarily made to turn upon the existence of a substantial question of law or fact. In the cases involving novel, difficult or important issues the Board usually grants oral argument. It does not ordinarily grant oral argument on any of the interlocutory phases of the case, as for instance, appeals taken during the course of a hearing from rulings on subpoena applications, on motions to disqualify a trial examiner, or on motions to dismiss allegations of the complaint. In most instances, opportunity for oral argument at the hearing is afforded the parties by the Trial Examiner.

In representation cases arising under Section 9 (c) of the Act the Rules (Section 102.60) specify that the Board may proceed to decide the case "upon the record, or after oral argument or the submission of briefs," but in its Statement of Procedure, the Board states (Section 101.20 (c)):

Because of the nature of the proceedings, however, permission to argue orally is rarely granted.

The Board similarly characterizes the frequency with which it hears oral argument in cases involving referendums on union security under Section 9 (e) (1) and (2) of the Act (Statement of Procedures, Section 101.25 (c)).

The Statement of Procedures provides that in jurisdictional dispute cases under Section 10 (k) of the Act (Statement of Procedures, Section 101.33):

The parties have 7 days after the close of the hearing to file briefs with the Board and to request oral argument which the Board may or may not grant.

Your more specific question as to whether this agency dismisses "petitions or applications insufficient on their face as a matter of law without allowing oral argument" is, we believe, answered by the preceding paragraphs as far as action by the Board itself is concerned.

In the regional offices, the Regional Director may refuse to accept a petition for certification which is insufficient on its face as a matter of law without, of course, oral argument or briefs. Section 102.63 of the Board's Rules and Regulations permits an appeal to the Board from the Regional Director's action in such cases. While the Board does not hear oral argument on such appeals, the appellant is not precluded from filing a brief.

The Regional Director may also refuse to issue a complaint when he deems the initiating charge to be insufficient as a matter of law. On appeal to the General Counsel from such action (pursuant to Section 102.19 of the Board's Rules and Regulations), no oral argument is had, although briefs may be filed. As the General Counsel's authority in such matters is final, under Section 3 (d) of the Labor Management Relations Act,



1947, Board review of his action is not available.

We hope the foregoing information will be helpful to you in the preparation of the brief in the above entitled case. If there is any further information which you desire, do not hesitate to call on us.

Sincerely yours,

Robert N. Denham,  
ROBERT N. DENHAM,  
*General Counsel.*

Ida Klaus,  
IDA KLAUS,  
*Solicitor.*

UNITED STATES MARITIME COMMISSION,  
*Washington 25, D. C., February 14, 1949.*

Honorable PHILIP B. PERLMAN,  
*Solicitor General Department of Justice.*

DEAR MR. PERLMAN. Reference is made to your letter of February 3, 1949 (D. J. File No. 82-38), referring to the decision of the Court of Appeals for the District of Columbia in *WJR, the Goodwill Station, Inc. v. Federal Communications Commission*, requesting advice as to Maritime Commission practice and the potential effect of the decision of the Court of Appeals upon the Maritime Commission.

The Maritime Commission's Rules of Procedure published in the Federal Register September 12, 1946 (Rule 201.130 reads as follows):

SEC. 201.130. *Oral argument at hearings.*—A request for oral argument at the close of testimony will be granted or denied by the presiding officer in his discretion.

Section 201.211 of the Rules reads as follows:

SEC. 201.211. *Oral argument.*—If oral argument before the Commission is desired on exceptions to an initial, recommended,

or tentative decision, or on a motion, petition, or application, a request therefor must be made in writing. Any party may make such request irrespective of his filing a brief or memorandum under section 201-197. If a brief or memorandum is filed excepting to or in support of an initial, recommended, or tentative decision, the request for oral argument must be incorporated in such brief or memorandum. Requests for oral argument on any motion, petition, or application must be made in the motion, petition, or application, or in the reply thereto. Applications for oral argument will be granted or denied in the discretion of the Commission, and if granted, the notice of oral argument will set forth the order of presentation. Upon request, the Commission will notify any party of the amount of time which will be allowed him. Those who appear before the Commission for oral argument should confine their argument to points of controlling importance. When the facts of a case are adequately and accurately dealt with in the initial, recommended, or tentative decision, parties should, as far as possible, address themselves in argument to the conclusions. Effort should be made by parties taking the same position to agree in advance of the argument upon those who are to present their side of the case, and the names of such persons and the amount of time requested should be received by the Commission not later than ten (10) days before the date set for the argument. The fewer the number of persons making the argument the more effectively can the parties' interests be presented in the time allotted.

The quoted sections of our Rules are conclusive that the Maritime Commission has never considered the *privilege* of arguing orally as a constitutional right. It is quite clear that compliance with the decision of the Court of Appeals in the case under discussion would require amendment of the Maritime Commission's Rules of Procedure, or at least an application in practice which would constitute negation of their meeting.

Section 201.191 of the Commission's Rules reads as follows:

Sec. 201.191. *Briefs; requests for findings.*—The presiding officer shall fix the time for filing briefs and the period of time allowed, subject to the provisions of section 201.4, shall be the same for all parties unless the presiding officer, for good cause shown, directs otherwise. Parties may not file more than one brief except in unusual cases. In investigations instituted on the Commission's own motion the presiding officer may require the attorney for the Commission to file a request for findings of fact and conclusions prior to the filing of briefs, and in such cases briefs shall be filed within twenty (20) days after the date of service of such request. Service of the request shall be in accordance with the provisions of section 201.94. In addition to the ordinary summary of evidence and statements of law, with appropriate citations of the transcript, and authorities relied upon, the brief shall contain proposed findings of fact and conclusions in serially numbered paragraphs.

We are aware of no precedent in the Maritime Commission relative to a precisely similar situation to that which was presented in the WJR case. Our practice under the quoted rules would allow the filing of briefs in support of a motion



to intervene, but would clearly permit the Commission to deny oral argument of such a motion. In our opinion, a requirement that oral argument be permitted in support of all petitions, applications, and motions which may be filed before the Maritime Commission would be extremely burdensome, time consuming, and would, in fact, hamper the efficient disposition of the Commission's business.

Such a requirement would appear, potentially, extremely dangerous to the efficient performance of the Commission's non-regulatory business, such as the routine settlement of accounts and disposition of claims. It would be infinitely troublesome as applied to the subsidy functions of the Maritime Commission pursuant to the Merchant Marine Act, 1936. The majority opinion of the Court of Appeals, of course, is not fully clear to us, and we do not assume that it will be construed to cover our subsidizing and proprietary functions. We, nevertheless, consider the possibility that it might be so construed as an additional reason for seeking reversal of what we regard as an essentially unsound decision.

Very truly yours,

Paul D. Page, Jr.,

PAUL D. PAGE, Jr.,

*Solicitor.*

FEDERAL POWER COMMISSION,

*Washington 25, Mar. 11, 1949.*

The Honorable PHILIP B. PERLMAN,

*Solicitor General, Department of Justice,*

*Washington, D. C.*

DEAR MR. PERLMAN. We have given considerable study to your letter of February 3, 1949, concerning the decision of the Court of Appeals for the District of Columbia Circuit in the case of *WJR, the Goodwill Station, Inc. v. Federal*

*Communications Commission.* The decision may have considerable effect upon our procedures, particularly in our Natural Gas Division where the volume of quasi-judicial matters is quite heavy.

It has been our practice to grant or deny without oral argument petitions for declaratory orders, petitions to intervene, and motions to dismiss. In addition we have usually afforded no opportunity for argument before denial of protests against the allowing of new rate schedules to become effective. In all cases, however, the Natural Gas Act affords the Commission an opportunity to hear parties on application for rehearing, which application is a prerequisite to judicial review. A logical extension of the doctrine of the *WJR* case might require the according of an opportunity for oral argument in all of the foregoing types of proceedings.

Petitions or applications for certificates of public convenience and necessity and to require new service by natural gas companies uniformly are disposed of after full hearing. The Commission on occasion has refused to accept such petitions or applications for filing on the ground that they did not conform to the Commission's rules and regulations but once properly filed such petitions or applications are heard. In all hearings the filing of briefs is permitted by specific rule. Our rules also permit requests for oral argument to be made and such requests are granted almost without exception.

However, the Commission has in a few instances dismissed incomplete applications for licenses for construction of hydroelectric power projects under Part I of the Federal Power Act. In no such case, so far as our search reveals, has such dismissal occurred without hearing where a hearing has been requested.

Requiring oral argument on the type of matters enumerated in the second paragraph of this letter

would impose a substantial burden upon the Commission and, I feel, would seriously impede it in the performance of its duties because of the great incident delay.

Sincerely,

Bradford Ross,  
BRADFORD ROSS,  
*General Counsel.*

POST OFFICE DEPARTMENT,  
OFFICE OF THE SOLICITOR,

*Washington 25, D. C., February 7, 1949.*

Honorable PHILIP B. PERLMAN,  
*Solicitor General, Department of Justice,*  
*Washington, D. C.*

Re: *WJR, The Goodwill Station, Inc. v. Federal Communications Commission*

DEAR MR. PERLMAN: I have your letter dated February 3, 1949, concerning the decision of the United States Court of Appeals for the District of Columbia in the above-entitled case.

It is noted that the Court has ruled that due process of law, as guaranteed by the Fifth Amendment, requires a hearing, including an opportunity to make oral argument, on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer except questions raised on interlocutory orders.

In response to your request for a statement of the practice of this Department in similar situations, the following information is furnished.

In ordinary fraud order proceedings, Rule 51.22 of the enclosed Rules of Practice In Cases Arising Under The Postal Fraud, Lottery And Fictitious Statutes, provides that "the trial examiner shall permit oral argument on behalf of the parties to the proceeding at the conclusion



of the hearing." However, under Rule 51.23, the trial examiner may exercise his discretion as to whether the filing of briefs in any case shall be permitted.

On petitions to reopen proceedings, Rule 51.24, no oral argument upon such petition is provided for by the rules. It has been the practice of the Department to grant or deny a request for such oral argument dependent upon the nature of the case and attendant circumstances such as the importance of the time element and, of course, the apparent validity of the grounds alleged in the petition and in the request for oral argument. Delays incident to arranging or rearranging the hearing dockets to provide a time and date for such oral argument might in certain types of cases so delay administrative action as to occasion great injury to the public. Of course, such delays must be avoided or minimized in order that the Postmaster General may properly perform his duty under the postal laws.

You will also note that Rule 51.28 makes no provision for oral argument in support of petitions for the revocation or modification of fraud orders. These petitions may and frequently do involve questions of law, which may be briefed by the petitioner. Even though questions of law are involved in such petitions and are not briefed, the petition may be disposed of without oral argument, although such argument might be granted in exceptional circumstances. Similar considerations apply to the granting and denial of hearings upon such petitions.

This office has numerous cases involving the disputed ownership of mail. Claimants are required to submit their statements in writing but no provision is made either for hearings or oral arguments where legal questions are involved. To do so would involve delay and expense to the parties and to the Department. Upon the basis of exten-

sive past experience, it does not appear that any useful or necessary purpose would be served by such provision.

No provision is made for hearings or oral arguments by parties seeking modification of rulings under the postal monopoly laws or so-called private express statutes.

For your information upon the subject of "due process" involving the exclusion or seizure of obscene matter deposited in the mails, there are herewith enclosed two copies of Litigation Manual Memorandum No. 5, discussing the case of *Jacobs, et al., v. Krutgen and Walker v. Poponoe*, 149 F. 2, 511, U. S. C. A., District of Columbia. You will note that the Poponoe decision is in harmony with the *Federal Communications v. WJR* decision.

This Department is daily engaged in making numerous decisions involving property rights not only in merchandise but in mailing rights. It also receives numerous requests in the nature of petitions to reverse decisions and to reinterpret the provisions of the postal laws in such manner as to favor the petitioners' use of the mails.

The Department establishes and disestablishes post offices every day without hearings and in the case of delivery services extends or curtails them as the needs and available facilities of the service require, always without hearings.

The Department rejects original applications for the entry of publications as second class matter or the admission of certain others to the special low classes of postage without formal hearings, which in the case of second class mail are only required in case of suspension or revocation of the mailing permit. Of course, petitions for reconsideration are disposed of without hearings or oral argument even though questions of law are raised incidentally thereto.

To subject all of these and many more numerous and daily proceedings to the require-

ments implicit in the Court of Appeals decision would hamper enormously the performance of its duties and the rendition of public service by the Post Office Department. Thus, the universal and literal application of the principles in the Court's decision would impose a substantial burden upon the postal establishment and impede the rendering of adequate, prompt mail service at a reasonable cost. In the final analysis such a burdensome requirement would be inimical to the general public interest without measurably or necessarily increasing the protection guaranteed by the Constitution and the laws of the United States to the users of the mails.

Very truly yours,

Roy C. Frank,  
ROY C. FRANK,  
*Acting Solicitor.*

UNITED STATES OF AMERICA,  
RAILROAD RETIREMENT BOARD,  
814 Rush Street, Chicago 11, Ill., Feb. 25, 1949.

The Honorable PHILIP B. PERLMAN,  
*Solicitor General,*  
Washington 25, D. C.

Re: File D. J. 82-38

DEAR MR. PERLMAN: I have your letter of February 3, 1949, requesting a statement, in connection with the preparation of the Government's brief in the case of *WJR, The Goodwill Station, Inc. v. Federal Communications Commission*, whether and under what circumstances this agency would grant oral argument on questions of law and what would be the effect on our agency of the decision of the Court of Appeals for the District of Columbia, in the above-mentioned case, that oral argument must be granted on any question of law arising before any judicial or quasi judicial agency.



Our agency administers the Railroad Retirement Act and the Railroad Unemployment Insurance Act. The Railroad Retirement Act provides old-age and disability annuities for railroad employees and lump sum or monthly annuity benefits for their survivors; the Railroad Unemployment Insurance Act provides benefits for unemployment due to lack of work or sickness or other disability and requires the Board to collect from employers covered by the Act the taxes or contributions necessary to finance the unemployment system. Both Acts authorize the Board to make investigations, to compel attendance of witnesses, to take testimony and make investigations in connection with the administration of these Acts, but neither requires expressly that oral argument be granted on any question presented to the Board. The closest that the Railroad Unemployment Insurance Act comes to such a requirement are the provisions that "at the request of any party interested" in a case involving coverage of the Act "the Board shall provide for a hearing" and in connection with a claim for benefits the Board must furnish, where benefits have been denied, either, depending on the issue involved, "an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto" or "a hearing" "at the request of any party properly interested." Section 5 (c). The Railroad Retirement Act is not as explicit on the right to a "hearing" as is the Unemployment Insurance Act, it providing only, as to this, that, in the event the Board has delegated authority to make a decision to a subordinate, the claimant "aggrieved by the decision so made shall have the right to appeal to the Board." Section 10 (b) 5.

In the initial adjudication of claims for benefits or determinations of coverage under either Act, the Board does not provide any opportunity for oral argument on any question. On appeals from

an initial determination to the intermediate appellate body which the Board has set up in connection with adjudications of benefit claims under the Railroad Retirement Act the Board's regulations provide, however, "full opportunity" "to present argument in support of the appeal," subject to the requirement that this intermediate agency "protect the record against scandal, impertinence and irrelevancies" (20 C. F. R., 1947 Supp., 260.2 (e)). In practice, this appellate unit has been very liberal in allowing oral and written argument on any question which is claimed to be involved in an appeal, but in a recent case an application by an attorney to be heard orally, because of the fear of an adverse precedent in cases other than those in which he was directly authorized to act, was summarily dismissed, as was also an application to argue orally, without regard to an actual case, the question of the constitutionality of a provision of the Railroad Retirement Act. On appeals to the Board itself, however, oral argument is not provided for all cases. While the Board has on occasion permitted such oral argument, it does not do so as a matter of right. The regulation on this point reads as follows:

The decision of the Board shall be made upon the record of evidence and argument which has been made in the handling of the case before final appeal to the Board, with such additions as may be made pursuant to this section. Further argument will not be permitted except upon a showing by the appellant that he has arguments to present which for valid reasons he was unable to present at an earlier stage, and in cases in which the Board requests further elaboration of the appellant's arguments. In such cases, the further argument shall be submitted orally or in writing, as the Board

may indicate in each case, and shall be subject to such restrictions as to form, subject matter, length and time as the Board may indicate to the appellant. (20 C. F. R., 1947 Supp., 260.3 (e).)

The regulations and the practice on appeals under the Railroad Unemployment Insurance Act are substantially the same as for the Railroad Retirement Act except that while there is a definite right of appeal to the Board in every case under the Railroad Retirement Act, the appeal to the Board under the Railroad Unemployment Insurance Act is a matter of discretion. Thus, under the Railroad Unemployment Insurance Act, the Board's regulations provide:

*Procedure upon filing application for permission to appeal to Board.*—The Board may grant or deny an application for permission to appeal to the Board, filed under § 320.38. Notice of the Board's decision with respect to an application for permission to appeal to the Board shall be communicated to the properly interested parties within fifteen days from the date such decision is made. If the application for permission to appeal to the Board has been denied, the notice communicated to the parties shall include notice that the decision of the referee is final decision of the Board. If permission to appeal to the Board is granted, the parties shall not have the right to submit additional evidence, except that (a) the Board may permit the submission of additional evidence upon a showing by any properly interested party that he has additional evidence to present which, for valid reasons, he was unable to present at an earlier stage; (b) the Board may request the submission of additional evidence; and (c) the Board



may designate any employee of the Board to take additional evidence, and to report his findings to the Board. Any such additional evidence shall be submitted in such manner as the Board may indicate and shall be included in the record. (20 C. F. R., 1947 Supp., 320.40.)

Further, the regulations provide:

*Decision of Board.*—The decision of the Board on an appeal to the Board shall be made upon the basis of the record established in accordance with § 320.28 [that is, at the hearing before the intermediate appellate body] \* \* \* (20 C. F. R., 1947 Supp., 320.42).

To grant oral argument at all stages in the Board's adjudication of claims for benefits or questions of coverage, and in respect of all questions of law which might arise, would impose an unbearable and wasteful burden on the Board in view of the many hundreds of thousands and even millions of such claims or questions adjudicated by the Board each year and in view of the small amounts involved. In the last fiscal year, for instance, the Board or its staff had to consider 1,346,574 claims for unemployment benefits due to lack of work, and 799,903 claims for benefits due to sickness, which were received in the year, and of the total pending, 1,852,440 were acted on favorably, the average unemployment benefit awarded being less than \$30, and the average sickness benefit about \$40. In addition, a total of 45,616 retirement annuity applications under the Railroad Retirement Act were ruled upon during the year, together with 69,111 applications for monthly or lump sum survivor benefits, all these, of course, generally involving sums much larger than the average unemployment or sickness benefit. (*The Monthly Review* (Railroad

Retirement Board) August 1948.) So that it is quite clear that no useful purpose, commensurate with the matters involved, would be served by requiring the Board to grant oral argument in every case and in every circumstance, and that so to do would intolerably hamper the Board's administration.

Sincerely yours,

Myles F. Gibbons,  
 , MYLES F. GIBBONS,  
*General Counsel.*

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UNITED STATES SECURITIES AND EXCHANGE  
 COMMISSION

*Washington 25, D. C., March 1, 1949.*

HON. PHILIP B. PERLMAN,  
*Solicitor General,*  
*Department of Justice,*

*Washington 25, D. C.*

Re: *WJR, The Goodwill Station, Inc. v. Federal Communications Commission*

DEAR MR. PERLMAN. This is in reply to your letter of February 3, 1949, inquiring as to the potential effect of the decision of the Court of Appeals in the above case upon this Commission's practice, with specific reference to the granting of oral argument, and permission to file briefs, in support of applications which appear insufficient on their face.

Although I believe that the situation involved in the WJR case is distinguishable from situations which might arise before this Commission, to the extent that the opinion of the court in that case tends to deprive administrative agencies of discretion in determining what procedures are appropriate to arrive at a fair determination, the decision might well have a serious adverse effect on

this Commission's policy of attempting to provide procedures best suited to particular proceedings. In view of the various sorts of administrative proceedings arising under the statutes administered by the Commission, in some of which time is necessarily of the essence if the public interests or the interest of regulated persons are not to be adversely affected, the Commission has consistently opposed rigid procedural requirements which, however suited to one type of proceeding might be unnecessary and possibly unfair in another context. See Comments of the Securities and Exchange Commission on S. 7 (1945), copies of which were sent to the Senate and House Committees on the Judiciary at the time bills looking to an Administrative Procedure Act were under consideration. As pointed out therein (p. 4):

\* \* \* if the standards for review of administrative action should come to depend upon technical interpretations of formal requirements, instead of upon considerations of fairness and practicability the agencies and those having business with them would frequently be driven to follow procedures which would be wasteful of both time and manpower and which would serve neither the public nor the private interests affected. Both the agencies and the parties before them would be compelled to do so for the sole purpose of avoiding possible grounds for captious attack upon orders or rules. Such procedural provisions would furnish a weapon for obstruction and delay not only to persons who may be striving to circumvent the statutes, but also to obstructionists seeking to prevent agency authorization of legitimate transactions sought by other parties.



While the present decision appears to turn upon conceptions of due process and not upon any specific legislative requirement, it may be noted that Congress in adopting the Administrative Procedure Act in its final form rejected the theory of the earlier bills that administrative due process could be rigidly defined.

In answer to your question regarding the filing of briefs, the Commission considers them on any application, and indeed they are normally required to be filed. See the Commission's Rules of Practice VI (b) and XI (c).

With respect to oral argument, in general the Commission has made it a practice to be very liberal in granting requests therefor. Since the granting of requests for oral argument, even with respect to contentions which have appeared on their face to be lacking in substance, has been done as a matter of policy and requests of this character have not thus far been numerous, the Commission has not found it burdensome to pursue a practice which may go as far as the requirement of the Court of Appeals in the WJR case. If, however, the decision of the Court of Appeals stands as making the granting of a request for oral argument a matter of right, no matter how frivolous the contention, we believe there is danger that this might encourage frivolous and dilatory requests to the point which would seriously interfere with the timely disposition of proceedings. Moreover, as the dissenting opinion notes, the question of whether opportunity for oral argument is a matter of due process is interrelated with the question of how long a period for argument constitutes due process. If the agency cannot decide as a matter of judgment to deny oral argument which does not seem likely to aid the decisional process, it is difficult to see at what point it may limit oral argument or direct counsel

to confine their argument to what appear to be relevant issues. If possible disagreement by a reviewing court on rulings of this character is to be ground for reversal regardless of the correctness of the Commission's ruling on the point of law involved, it will be compelled as a matter of precaution to give more time to oral argument than it believes warranted. This will necessarily leave it less free to devote itself to matters which it regards as more important to protect both private and public interests.

The Commission's formal rules with respect to oral argument are contained in its Rules of Practice: Rule VI, Motions and Procedural Applications; Rule XII, Hearings Before the Commission; and Rule XVII, Intervention, Leave to be Heard, Informal Participation.

Rule VI (b) provides that "motions or procedural applications calling for determination by the Commission" shall be made in writing and "shall be accompanied by a written brief of the points and authorities relied upon in support of the same." The rule then provides:

No oral argument will be heard on such matters unless the Commission so directs.

Applications of this sort appear to fall in part at least within the exception noted by Chief Judge Stephens with respect to "such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite*, for temporary injunctions and the like." In any event, as a practical matter, even on procedural applications pursuant to Rule VI (b) the Commission often grants requests for oral argument.

Rule XII (a) of the Commission's Rules of Practice provides:

Except as to motions and procedural applications dealt with in Rule VI, upon written request of any party the matter

to be decided by the Commission will be set down for oral argument before the Commission unless exceptional circumstances make oral argument impractical or inadvisable.

So far as I have been able to ascertain, the Commission has never denied a request by a party for oral argument pursuant to this rule.

The dissenting opinion in the WJR case describes WJR's application to the Federal Communications Commission as basically a petition to intervene. Whether or not it would be more burdensome, in the context of the Federal Communications Act, to accord oral argument upon insubstantial petitions for intervention than upon other applications insufficient on their face, I believe there is a relevant distinction under the Public Utility Holding Company Act between primary applicant for relief and the status of persons appearing in opposition thereto. Under that Act virtually all important financial transactions by registered holding companies and their subsidiaries must be subject to authorization of this Commission in the light of broad standards relating to the public interest or the "interest of investors" and objecting security holders frequently request opportunity to be heard, or to intervene, in connection with applications for such authorization. In view of the time element in many financial transactions, delayed authorization may be tantamount to denial. Consequently, while expressions of views of objecting investors may be helpful, full participation by these investors could prove unreasonably obstructive. Section 19 of the Public Utility Holding Company Act provides that the Commission "shall" admit as a party any interested agency, such as a state authority, and "may admit as a party any representative of interested consumers or security



holders, or any other person whose participation in the proceedings may be in the public interest or for the protection of investors or consumers.”<sup>1</sup>

<sup>1</sup> This problem was also brought to the attention of the Congress when it had under consideration early drafts of the bill which became the Administrative Procedure Act of 1945. In the May 1945 Committee Print of S. 7, “party” was defined by Section 2 (b) of the bill as including “any person or agency participating, or properly seeking and entitled to participate, in any agency proceeding or in proceedings for judicial review of any agency action.”

This Commission pointed out to the interested Congressional Committees that the definition so phrased “by including without qualification persons participating in agency or review proceedings, fails to recognize the desirability in many proceedings of granting limited participation to certain persons without conferring all the rights that attach to one having the status of a ‘party,’ and fails to differentiate clearly between parties to agency proceedings and parties to judicial review proceedings.” The Commission pointed out, *inter alia*, that, “the existence of a great number of parties would result in delay; which, because of ever changing market conditions, might make impossible the effectuation of the proposal for which Commission approval was sought,” and also pointed out that:

“It would seem unnecessary for purposes of the bill to define ‘party’ with reference to proceedings for judicial review, and inasmuch as persons not parties to an agency proceeding may nevertheless have standing for purposes of judicial review, it seems to us confusing to define in the same sentence the word ‘party’ for both purposes.”

The Commission then recommended that the second sentence of Section 2 (b) be amended to read:

“‘Party’ includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding.”

which language was used in the Act as enacted. See Appendix to Comments of the Securities and Exchange Commission, dated July 25, 1945, on Specific Provisions of S. 7,

Rule XVII of the Commission's Rules of Practice relating to intervention, leave to be heard, and informal participation, evidences a policy of the Commission generally to deny intervention as a full party to anyone except certain government agencies and similar bodies. Instead interested persons are, at the discretion of the hearing officer, given leave to be heard (Rule XVII (b)) which may include the right to call and examine witnesses and otherwise actively participate in the hearing (Rule XVII (c)), and the hearing officer is directed to grant leave to be heard in certain situations (Rule XVII (f)). Oral argument by persons granted limited participation may be granted, however, "only by the Commission upon written request therefor" (Rule XVII (e)). In practice, the requests for oral argument of persons who have been granted a limited right to be heard are normally granted to the same extent as those of full parties. The Commission has, however, had occasion to deny oral argument on a motion by a party to strike the appearance of several persons granted limited rights of participation. See *Philadelphia Company*, -- S. E. C. --, Holding Company Act Release No. 7381 (1947), where the Commission stated it was denying the request for oral argument "since the issues raised were fully explored in the briefs and since it does not appear that

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Revised Text, Committee Print May --, 1945, pp. 1-3. The subsequent report of the Senate Committee on the Judiciary pointed out that by the definition of "party" in Section 2 (b) of the Act:

"The practice of agencies to admit persons as parties in proceedings for limited purposes is expressly preserved, but that exception does not authorize any agency to ignore or prejudice the rights of the true or full parties in any proceeding." S. Rep. No. 752 (1945), 10-11.

oral argument would be of any additional aid in the dispositions of the motions."<sup>2</sup>

Assuming that in some instances a private person seeking to participate in the Commission proceeding might have such an interest, not otherwise adequately represented, that the denial of intervention or of limited participation by the Commission could be considered an abuse of discretion, it seems clear that the Commission must nonetheless have a very wide discretion to deny participation to persons who apart from the Act would have no legal interest to object to the granting of the relief sought by the primary party to the proceeding, even where under the Act he would be entitled to have a reviewing court consider his objections and set aside the Commission's authorization if erroneous. See *Okin v. Securities and Exchange Commission*, 325 U. S. 385.

While the Holding Company Act makes it mandatory to accord an opportunity for hearing upon plans of reorganization, Sections 7 (b) and 10 (d) indicate that in the regulation of current transactions it must accord an opportunity for hearing only where authorization for the proposed transaction is denied. Nevertheless, under Rule U-23 it is the practice of the Commission to publish notice of the filing of applications in order to afford interested persons an opportunity to request a hearing thereon. Such notices require interested persons desiring a hearing to file a request therefor by a prescribed date, setting forth their interest and the reasons for their request. Despite receipt of a request by an inter-

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<sup>2</sup> Subsequently in the same case, where the hearing officer denied the limited participation sought because the person seeking participation refused to set forth certain matters deemed relevant to his interest in the case, oral argument on the propriety of the hearing officer's determination was heard by the Commission. *Philadelphia Company*, — S. E. C. —, Holding Company Act Release No. 7590 (1947).



ested person, the Commission has on occasion refused to hold a hearing where it appears from the statement filed that no useful purpose will be accomplished by the hearing, especially where the delay might "open an avenue for obstruction and delay to the prejudice of parties to the proceeding." See *Electric Bond and Share Company*, — S. E. C. — Holding Company Act Release No. 7383 (1947) 4. In that case the Commission did hear oral argument on the question whether it should hold evidence-taking hearings on the application there involved but it has apparently not always done so, at least where no specific request for oral argument was made. See *American & Foreign Power Company, Inc.*, Holding Company Act Releases Nos. 5757 (1945) and 5989 (1945). Since the person seeking hearings in those proceedings would be a person aggrieved by the Commission's order, it might be argued that the action of the Commission in denying the request was improper under the court's decision in the WJR case. This would appear to be inconsistent, however, with the provisions of Section 19 of the Holding Company Act, referred to above, that the Commission should admit private individuals as parties to proceedings only if their participation "may be in the public interest or for the protection of investors or consumers."

The Commission has on occasion denied requests for hearing by persons who claim to be affected by the action of the Commission in cases where the applicable statute requires no hearing and the Commission believes the applicants are not persons who can be "aggrieved" by its action. Thus where a minority security holder requested a hearing before the Commission to determine in effect whether a registration statement filed by his corporation pursuant to Section 6 of the Securities Act of 1933 should be permitted to become effective; this request was denied by the Commission and no oral argument was permitted. See

*Crooker v. Securities and Exchange Commission*, 166 F. 2d 944 (C. A. 1, 1947). Similarly, the Commission has denied requests for a hearing on proxy solicitation material filed by another party pursuant to the Commission's Rule U-62 and Section 12 (e) of the Public Utility Holding Company Act. See *Phillips v. Securities and Exchange Commission*, 171 F. 2d 180 (C. A. 2, 1948). I do not think that the WJR decision would require the Commission to hold hearings in these situations because of the completely discretionary nature of the administrative determination and the absence of any statutory provision according any right of participation to the persons seeking a hearing.

I am enclosing for your convenience copies of all Commission documents referred to herein. Please do not hesitate to call upon me if I can be of any further assistance.

Very truly yours,

Roger S. Foster,  
ROGER S. FOSTER,  
*General Counsel.*

Enclosures:

Rules of Practice.  
Comments on S. 7.  
H. C. A. Release No. 7590.  
H. C. A. Release No. 7381.  
H. C. A. Release No. 7383.  
H. C. A. Release No. 5757.  
H. C. A. Release No. 5989.

FEDERAL SECURITY AGENCY,  
Washington, Zone 25, February 17, 1949.

Hon. PHILIP B. PERLMAN,  
*Solicitor General, Department of Justice,*  
Washington 25, D. C.

DEAR MR. PERLMAN: Reference is made to your letter of February 3, 1949 in which you

inquire as to the effect of the decision of the Court of Appeals for the District of Columbia in *WJR, the Goodwill Station, Inc. v. Federal Communications Commission* on this Agency.

The only administrative unit of the Federal Security Agency which may be affected by that decision is the Food and Drug Administration. None of the other administrative units render ex parte decisions under any circumstances.

The principal adjudicatory proceeding with which the Food and Drug Administration is concerned arises in connection with its refusal to permit an application with respect to a new drug to become effective [21 U. S. C. 355 (d)]. In such cases it has been the practice not to permit oral argument on questions of law; but there is no regulation in effect governing that practice.

The rules of practice of the Food and Drug Administration provide that in rule-making proceedings no oral argument shall be permitted unless authorized by the presiding officer [21 CFR. Cum. Supp. 2.709] but written arguments are received routinely.

Specifically, the Food and Drug Administration will dismiss, without oral argument, a petition or application to amend a standard of identity for a food where the petitioner's application is insufficient on its face as a matter of law. No provision is made for the filing of briefs in support of the application or petition before its dismissal, although a brief would be considered if it had been submitted with the application.

Should the decision in the above case be extended to rule-making proceedings arising under the Federal Food, Drug, and Cosmetic Act, it would greatly burden this Agency and impede the performance of its duties. Rule-making proceedings looking to the establishment of standards for food products ordinarily cover the operations of large industries. We recently have completed hearings looking to the standardization of cheese



products, frozen fruits, and salad dressing. The cheese record exceeds 5,000 pages. The other records are comparable in length. Many interests were concerned. If the statutory obligation of hearing requires a right to oral argument upon law questions, these proceedings may well be endless. Certainly, a very substantial portion of the Agency's time would be devoted to oral arguments on questions of law.

Sincerely yours,

Robert C. Ayers,  
ROBERT C. AYERS,  
*Associate General Counsel.*

FEDERAL TRADE COMMISSION,  
*Washington 25, February 14, 1949.*

D. J. File No. 82-38

HON. PHILIP B. PERLMAN,

*Solicitor General, Department of Justice,  
Washington, D. C.*

DEAR MR. PERLMAN: I am in receipt of your letter of February 3, 1949, regarding the decision of the Court of Appeals for the District of Columbia in the case of *WJR, The Goodwill Station, Inc., v. Federal Communications Commission*, requesting information as to the practice of the Federal Trade Commission in similar situations and of the potential effect of the decision upon this Agency.

The Rules of Practice of the Federal Trade Commission provide for oral argument as follows (Rule XXIV (c), 12 Fed. Reg. 5997, 6001, Sept. 10, 1947):

Oral arguments before the Commission shall be had as ordered, on written application of the Chief Trial Counsel of the Commission, or of the respondent, or of attorney for respondent, filed within fifteen

(15) days after filing of brief on behalf of respondent.

Oral arguments before the Commission shall be reported stenographically unless otherwise ordered by the Commission.

The first section of the same rule (Rule XXIV (a)) sets forth the questions which may be presented to the Commission, by brief or argument, as follows:

Questions which may be presented for consideration and decision by the Commission on final hearing include the following:

(1) Whether the findings and conclusions recommended by the trial examiner are relevant and material to the issues and are supported by reliable, probative, and substantial evidence and by the greater weight of the evidence;

(2) Whether additional findings and conclusions, not recommended by the trial examiner, should be made either with or without sending the case back to the trial examiner for the reception of further evidence;

(3) Whether the trial examiner was justified in having taken official notice of any fact and whether the Commission should take official notice of any other fact;

(4) Whether due process was observed and whether there was any prejudicial irregularity in procedure;

(5) Whether the facts show a violation of law amenable to redress by the Commission and what conclusions of law are justified and requisite in the premises; and

(6) Whether an order to cease and desist, an order of dismissal, or other order, should be entered and issued, and the substance and form thereof.

While the rule relating to argument does not require the Commission to grant argument on any matter, it has been the invariable practice of the Commission to grant argument at the final hearing on the merits unless argument is waived.

If the Commission were required to grant argument on any point of law raised to it by petition or application, however frivolous or ill-founded, the effect might well be to interfere in a substantial manner with the orderly conduct of its business.

One instance where this rule might prove unfortunate is the matter of a petition to intervene in a pending proceeding. Both the Clayton and Federal Trade Commission Acts provide that any person may make application for leave to intervene and appear in any proceeding upon good cause shown. While the Commission has often granted argument on the question of the right of a person to intervene in a proceeding, it has never considered that argument was required as a matter of right. To require argument on application for intervention which did not show on its face a substantial interest or such other facts as would constitute "good cause" for intervention might serve to delay unduly the Commission's conduct of cases.

Another similar situation might arise in the case of a motion to dismiss a complaint issued by the Commission and while hearings are in process before a trial examiner. Should such a motion fail to state any substantial ground for dismissal, the Commission has considered itself justified in acting on briefs and without argument, and any other rule would make it conceivable for a party to require the Commission to sit in continuous session hearing argument on successive motions to dismiss, even though the right of full argument on the merits at the final hearing is provided by our rules of practice. Here again, the Commission



has granted argument as a matter of practice when there appeared to be presented a substantial question which warranted argument.

In neither of these situations has there been heretofore any substantial problem of procedure, and I cannot say that there is any reasonable likelihood that one will develop in the Federal Trade Commission. Nevertheless, if the holding of the Court in the *WJR* case is sustained, and the Commission is required to grant argument to any person who asserts a question of law, whether or not his petition or application is clearly frivolous, dilatory or otherwise insufficient, there is created a serious possibility that the disposition of cases before the Commission may be unduly hampered and delayed.

Respectfully yours,

W. T. Kelley,  
W. T. KELLEY,  
*General Counsel.*

## DEPARTMENT OF COMMERCE,

## OFFICE OF THE SOLICITOR,

*Washington 25, April 4, 1949.*

The Honorable

The SOLICITOR GENERAL,

*Department of Justice,**Washington 25, D. C.*

Re: *WJR, The Goodwill Station, Inc. v. Federal Communications Commission.*

DEAR MR. SOLICITOR GENERAL: Pursuant to your request I am submitting herewith the comments of the Civil Aeronautics Administration, Patent Office, Office of Domestic Commerce, and Office of International Trade in regard to the above-captioned case, together with a copy of their regulations which may be affected thereby.

The foregoing are the only constituent units of the Department which may be affected by the subject cases.

Sincerely yours,

Matthew Hale,

MATTHEW HALE,

*Acting Solicitor,*

Enclosures: \_\_\_\_\_

To: Acting Solicitor, Department of Commerce.

From: General Counsel, A-18 [Civil Aeronautics Administration].

Subject: *WJR, The Goodwill Station, Inc. v. Federal Communications Commission.*

Reference is made to your memorandum, dated February 10, 1949, requesting information regarding the effect on this agency of the decision in the case of *WJR, The Goodwill Station, Inc. v. Federal Communications Commission.*

The powers and duties of the Administrator of Civil Aeronautics are defined in the Civil Aeronautics Act of 1938 and the Federal Airport Act.

The Civil Aeronautics Act, as modified by the President's Reorganization Plans III (April 2, 1940) and IV (April 11, 1940), sets up a form, the Civil Aeronautics Board, divorced from the Civil Aeronautics Administration, and which exercises its authority completely independent of the Department of Commerce. The quasi-judicial functions under the Act are relegated to that Board. An independent study of the possible effects of the WJR decision on the operations of the CAB is being prepared and will be submitted by its staff.<sup>1</sup>

The functions of the Civil Aeronautics Administration are almost exclusively executive. The Administrator may, however, conduct hearings on applications for a "type certificate" (a certificate that some prototype of aircraft or aircraft appliance meets minimum safety requirements), under Section 603 (a) of the Civil Aeronautics Act. This provision for hearings is permissive rather than mandatory, and is, therefore, exempted from the rule set forth in the WJR case.

Although the Civil Aeronautics Board is given exclusive authority to suspend or revoke any certificate issued under the Civil Aeronautics Act (Section 609, Sec. 7, Reorganization Plan III), and to hear petitions for reconsideration of denials of airman certificates (40 Op. A. G. 11), the Administrator has power to alter, amend, or modify certain certificates.

Section 609 of the Act requires that such action be taken only "upon notice and hearing." Such a hearing has not yet been necessary. All alterations, amendments and modifications which have been pressed by the Administrator have been voluntarily

<sup>1</sup> A reply from the CAB had not been received by the Solicitor General when this brief went to press.



accepted by the certificate holder. The Administrator, nevertheless, has promulgated regulations governing the conduct of such hearings should occasion for these proceedings arise. These regulations (Part 406, Regulations of the Administrator of Civil Aeronautics, Sections 406.5 through 406.8) provide for a hearing in every case in which one is requested. No conflict is anticipated with the rule in the WJR case.

It is assumed that the WJR case applies only where the statute governing the administrative activity provides for a hearing or where a hearing is necessary to satisfy the "due process of law" requirements of the Constitution. The Administrator may, without hearing, refuse to issue a variety of certificates (type certificates, production certificates, airworthiness certificates, air carrier operating certificates, air navigation facility certificates, and air agency certificates). Since no such action denies a vested property right and since the Civil Aeronautics Act does not provide that a hearing shall be conducted upon such denials, it is assumed that the rule of the WJR case does not apply.

Hearings are required to be conducted under the Federal Airport Act, which is administered by this agency. Section 9 (e) of that Act provides:

Project applications shall be matters of public record in the office of the Administrator. Any public agency, person, association, firm, or corporation having a substantial interest in the disposition of any application by the Administrator may file with the Administrator a memorandum in support of or in opposition to such application; and any such agency, person, association, firm, or corporation shall be accorded, upon request, a public hearing with respect to the location of any airport the development of which is proposed. The Administrator is authorized to

prescribe regulations governing such public hearings, and such regulations may prescribe a reasonable time within which requests for public hearings shall be made and such other reasonable requirements as may be necessary to avoid undue delay in disposing of project applications.

The "project applications" referred to are application by state or local public agencies for grants-in-aid for construction of airport facilities, under a National Airport Plan for coordinated expansion of airport facilities on a national scale.

Section 550.10 of the Regulations of the Administrator of Civil Aeronautics provides for the filing of memoranda in support of, or in opposition to project applications and, further, "If, in the opinion of the Administrator, the party filing the memorandum has a substantial interest in the matter, a public hearing will be held in accordance with paragraph (b) of this section." Obviously, if the WJR case doctrine controls, the quoted portion of that regulation, which authorizes the Administrator to determine whether the intervenor has a substantial interest, must fail. The problem, however, is largely academic. In the course of processing some seven hundred project applications since the enactment of the Federal Airport Act in 1946, only one memorandum in opposition has been received and, in that case, the objector was afforded a hearing.

However, if the decision stands for the proposition that the granting of any "hearing" by Congress automatically guarantees to the party a due process hearing, the decision will undoubtedly offer encouragement to parties to contest airport locations under the Federal Airport Act and will result in a greater amount of litigation under that Act.

R. E. Elwell,  
R. E. ELWELL, A-18.

DEPARTMENT OF COMMERCE,  
UNITED STATES PATENT OFFICE,

Washington, February 15, 1949.

MEMORANDUM

To: Matthew Hale, Acting Solicitor, Department of Commerce.

From: W. W. Cochran, Solicitor, Patent Office.

Subject: WJR, *The Goodwill Station, Inc. v. Federal Communications Commission.*

The decision above referred to would apparently require the Patent Office to grant oral hearings in a large number of cases which have previously been disposed of without such hearings. These cases would include almost all petitions to the Commissioner in ex parte and inter partes patent and trademark cases, including petitions to revive abandoned applications and to accept late payment of final fees in allowed applications. The total number of such petitions during the past year was more than one thousand. It is also at least questionable whether the decision would not require oral hearings on petitions for rehearing by the Commissioner, the Board of Appeals, or the Board of Interference Examiners. The routine practice of the primary and interference examiners and the Board of Appeals would not be seriously affected, since it is the present practice of those tribunals to grant oral hearings when requested in the great majority of cases.

The principle stated in the decision would require the deletion of patent rule No. 181 (c) and trademark rule No. 27, which provide that oral hearings on petitions will be granted only in the discretion of the Commissioner.

\* It is probable that oral hearings would be requested only in a small percentage of cases but, even



so, a very considerable burden would be imposed upon the Commission or Assistant Commissioners, since the presence of one of them would be required at every hearing on a petition to the Commissioner. Moreover, the delay incident to oral hearings would greatly increase the time required for disposing of petitions and would encourage the bringing of petitions for purposes of delay.

(Signed) W. W. COCHRAN,  
Solicitor, Patent Office.

MARCH 8, 1949.

MEMORANDUM

To: Mr. Matthew Hale, Acting Solicitor.  
From: J. P. Brown, General Counsel, ODC [Office of Domestic Commerce].  
Subject: Solicitors General's letter 2/3/49 re *WJR, Goodwill Station, Inc. v. F. C. C.*

I am in receipt of your memorandum of February 16 enclosing a letter to the Solicitor from the Solicitor General of the United States dated February 3, 1949, commenting upon the decision of October 7, 1948, of the Court of Appeals for the District of Columbia in *WJR, The Goodwill Station, Inc. v. Federal Communications Commission*. Also enclosed with the Solicitor General's letter is a copy of the opinion of the Court of Appeals.

The Solicitor General asks for a statement as to our practice in similar situations and of the potential effect of the decision of the Court of Appeals.

*Practice and Procedure in Office of Domestic Commerce.*—The Office of Domestic Commerce has issued, pursuant to P. L. 606, 80th Congress, as amended, P. L. 469, 80th Congress, and Sec. 205 of P. L. 793, 80th Congress, certain so-called allocation orders such as Allocation Order M-43 dealing with the control of tin; M-81 dealing with the control of

tin-can manufacturing; M-112 dealing with the control of anonymity; R-1 dealing with synthetic rubber and synthetic rubber products; and Orders N-1 and D-1 dealing with the distribution of nitrogenous fertilizer materials. These orders place restrictions of one kind or another on members of industry and these restrictions are frequently found to be burdensome and oppressive.

Each of these orders is implemented and administered by an administrator, under delegations coming down from the Secretary of Commerce. Each one of these orders contains a provision providing for relief or exemption from the provisions of the order. See Sec. 338.13 of the copy of M-43 attached as Exhibit 1.

Such an appeal, or initial submission as it is called, is made to the administrator of the order by the aggrieved party. The administrator considers the material submitted to him and determines whether the case shows that the application of the particular provisions of the order would result in undue and excessive hardships on the appellant not suffered by other similarly situated or would result in improper discrimination. If he finds such hardship or discrimination, he generally grants the appeal, otherwise he denies the appeal. The order itself (such as M-43) does not provide for a hearing, but it is a matter of practice, if the aggrieved party wishes to talk over the problem, for the administrator to discuss it with him informally. This procedure is, of course, in general only possible where the appellant can conveniently get to Washington.

In those cases in which a denial by the administrator of the initial submission is not acceptable to the appellant, he may secure a full review before the Appeals Board of the Bureau of Foreign and Domestic Commerce. This Board, appointed by the Assistant Secretary, has recently been set up by order of the Secretary of Commerce dated February 1, 1949 (49 FR 774), as an impartial reviewing

body to pass upon appeals from orders and regulations of the ODC. It replaces an earlier appeals board established in ODC. The new Board also handles appeals coming up from the OIT but the Board's practices in regard to these matters is not commented upon here.

The Office of Domestic Commerce has long had a regulation, designated Allocations Regulation 3 which spells out the appeals procedure. A copy of AR 3 is attached hereto as Exhibit 2.

There are no pleadings, formal or otherwise, provided for in AR 3. The aggrieved party merely writes a letter addressed to the Board in which he identifies the order or regulation involved and the particular provision thereof, the decision from which he appeals, and his grounds for claiming the hardship or discrimination specified in Sec. 336.52. This letter serves as the petition. The Government files no reply or answer. If the appellant at the hearing chooses to mend his hold, or to take a new line, the Board would undoubtedly accommodate him. The Board makes no sharp distinction between law and fact and it conducts the hearing in an informal fashion. It prefers to have the party himself conduct his case rather than an attorney. There is little in the way of cross-examination although the Government is permitted to ask whatever questions it desires to put to the appellant. There has been no specific provision up to now in AR 3 for oral argument. However, the practice of the Board has always been to allow the defendant to speak his mind in any fashion he chooses, so it may be said that for all practical purposes, oral argument is permitted.

AR 3 is now being amended in view of the fact that the new Appeals Board has been set up. The amendment to AR 3 will not change it in any major respect. But in view of the decision in *WJR v. FCC* I think it would be well specifically to provide, probably in paragraph (h) of Sec. 336.61, that the appellant may present an oral argument or file a brief on the law and facts involved if he so desires.



It will be noted that in AR 3 the appellant is given the right to request a hearing. See Sec. 336.61. The Board has never refused to grant a hearing if it is requested. However, if a hearing is not requested, the Board feels free to deal with the appeal on the papers before it. The decision of the Appeals Board is final departmental action. See Sec. 336.58 of AR 3.

In ODC appeals, no case has arisen in which the letter of appeal was so deficient that the Board would feel it could dismiss the appeal as if on demurrer. But if such case did come up, the rule in *WJR v. FCC* would apparently require a hearing.

*Effect of the decision in WJR v. FCC.*—In the case under consideration, the denial of the appellant's petition for reconsideration of the Commission's decision of August 22, 1946, made without an opportunity for hearing, represented the final action of the Commission. In the ODC procedure referred to above a decision by the administrator of an order denying an initial submission by an appellant, is not final agency action. Hence it would appear that an inflexible rule requiring opportunity for oral argument before the administrator is not necessary. But since the Appeals Board's decision is the final departmental action, there is certainly no objection to permitting oral argument if desired, by the appellant particularly as we are now told it is required by due process.

To require oral argument on every matter presented to the administrator would impose a substantial burden and would impede the performance of the administrator's duties. The initial submission to the administrator is designed to accomplish prompt and summary action, and in a very high percentage of cases the appellant is satisfied even where his request for relief is denied

by the administrator. I see no necessity for changing our procedure so far as the initial submission to the administrator is concerned. But as stated in the footnote on page 2, in revising AR 3 we will make suitable provision (after consultation with Mr. Harrison Lillibridge, Chairman of the Appeals Board) for oral arguments and briefs when requested by the appellant or by the Government. It may be noted that AR 3 is a public document, published in the Federal Register; and hence all appellants will be deemed to have knowledge of its provisions. They will be there advised that if they request it they may have oral argument or may file briefs.

One final comment. The rule in *WJR v. FCC* seems to be merely that the Commission ought not to have dismissed the petition on the ground that it showed no cause of action, without having held a hearing, which would include oral argument. This memorandum goes beyond that, in advocating that appeals procedure include oral argument (and briefs), when requested, as part of due process.

(Copy)

DEPARTMENT OF COMMERCE

OFFICE OF INTERNATIONAL TRADE

Washington 25, D. C., March 2, 1949.

MEMORANDUM

To: Mr. Matthew Hale, Acting Solicitor.

From: Nathan Ostroff, OIT General Counsel.

Subject: *WJR, The Goodwill Station, Inc. v. Federal Communications Commission* (Ct. of App., p. c.)

This is in reply to your request for comments upon the possible effect of the above case upon the operations of the OIT. It is understood that

you will prepare a statement of the Department's position as a whole for submission to the Solicitor General in accordance with his letter of February 3, 1949. I am informed incidentally that the Supreme Court granted certiorari in the case on February 28.

The holding of the U. S. Court of Appeals for the District of Columbia to the effect that an oral hearing is required by the Fifth Amendment on every question of law raised before a judicial or quasi-judicial tribunal conceivably might have a bearing upon (1) OIT procedure in granting or denying individual applications for export licenses and (2) OIT compliance procedure for suspension of export license privileges.

The Export Control Act, as you know, leaves the approval or denial of license applications very much to administrative discretion and as well the determination of criteria or standards used in such determinations. There should be kept in mind in this connection the fact that there is a recognized legal distinction in the matter of delegating legislative powers where foreign affairs are involved, as in the case of export controls, as contrasted to matters of domestic concern. The Courts have always recognized, with respect to the former, that there must be accorded a degree of discretion and freedom from restriction which would not be permitted were domestic matters alone involved. I am not sure, therefore, that the decision here in question, unqualified as it may seem, would necessarily be followed in a similar case under the Export Control Act. I am also not sure whether we fall within the area of a judicial or quasi-judicial agency in administering the licensing phase of export control.

In any event, however, I should point out that we now provide, by regulation, for appeals from our licensing action, and in practice, the Appeals





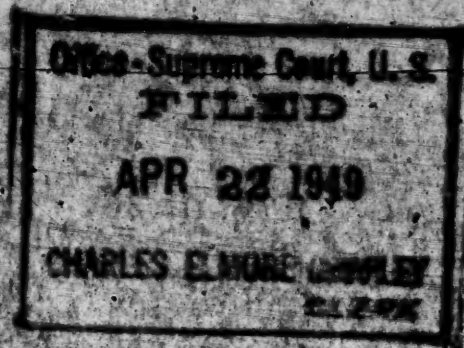
Board permits oral hearings upon request. You will probably want to check with Harrison Lillibridge, but I should assume that he would like to feel free to dismiss certain cases without such hearings where, in his judgment, they could serve no purpose.

To sum up—the questions are whether the rule in this case applies to export licensing operations; if not, then it does not, of course, apply to cases before the Appeals Board; if so, there is still the question whether oral hearings before Appeals Board suffice to validate our practice of not permitting hearings in the first instance. To the extent that this case casts uncertainty on any of these questions, we, of course, favor an appeal and urge that an effort be made to clarify the rule as to such situations. We would have no objection to being cited as a horrible example of the possible impact of the decision, in the light of our handling 10 to 15 thousand license applications per week.

The second application, which the WJR ruling might have is to our compliance cases in which we issue orders against violators suspending license privileges for stated periods of time. In practice, oral hearings are held in all except default cases, regardless of the merits or demerits of any answer or ~~other~~ defense which may be offered. Again, however, there may be cases in which we will want to discontinue this practice and we should be free to enter a compliance order on the basis of a written answer which alleges no facts which would constitute a legal defense. The WJR decision would seem to require an oral hearing in this situation unless, as indicated above, there is an implied exception for our operations because of their foreign affairs relationship.

(Signed) NATHAN OSTROFF.

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**No. 495**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1948**

**FEDERAL COMMUNICATIONS COMMISSION,  
PETITIONER**

**WJR, THE GOODWILL STATION, INC., AND COASTAL  
PLAINS BROADCASTING CO., INC., INTERVENOR-  
RESPONDENT**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**SUPPLEMENT TO APPENDIX B TO BRIEF FOR THE  
FEDERAL COMMUNICATIONS COMMISSION**

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CIVIL AERONAUTICS BOARD,  
*Washington 25, April 15, 1949.*

Honorable PHILIP B. PERLMAN,  
*Solicitor General,*  
*Department of Justice,*  
*Washington 25, D. C.*

DEAR MR. PERLMAN: This is in response to your letter of February 3, 1949, with reference to the decision of the Court of Appeals for the District of Columbia in the case of *WJR, The Goodwill Station, Inc., v. Federal Communications Commission*, in which letter you request advice as to the practice of the Civil Aeronautics Board in similar situations and the potential effect of the decision of the Court of Appeals upon the Board.

Since that decision was handed down we have had occasion, doubtless in common with numerous other agencies of the government, to give considerable thought to these very questions. Obviously, the impact of the Court's decision upon the Board's administrative processes will depend upon the universality of the inflexible requirement of oral argument which the decision appears to impose upon administrative processes. If the decision is to be given the widest scope which the language of the majority opinion seems to intend, we believe that a very considerable



disruption of the Board's work could result therefrom.

As background to the effect of such a requirement upon the Board it is desirable to review briefly certain pertinent provisions of the Civil Aeronautics Act of 1938, as amended, and the Board's regulations issued pursuant thereto. Our Act provides for numerous actions to be taken only after notice and hearing. Such, for example, are the issuance of certificates of public convenience and necessity, the fixing of rates, and the approval or disapproval of mergers and acquisitions of control. (Sections 401 (c), 406 (a), 408 (b) and 1002 (d)). The Act also authorizes the Board to take various other actions without making any provision regarding notice or hearing. Such, for example, are the approval and disapproval of interlocking relationships, the approval or disapproval of contracts, and the issuance of exemptions. (Sections 409 (a), 412 (b), 416 (b)).

In still other instances the Act expressly authorizes Board action without hearing as, for example, in the case of the dismissal of complaints which do not state facts which warrant action on the Board's part and the suspension of rates pending hearing with respect thereto. (Sections 1002 (a) and 1002 (g).)

The Act does not define all the elements necessary to constitute a hearing. It does, however, provide that "in all cases heard by an examiner



or a single member, the [Board] shall hear or receive argument on request of either party." (Section 1004 (a).)

There is attached hereto an appendix containing excerpts from the Board's Rules of Practice with regard to the submission of briefs to and oral argument before the Board in its proceedings.

As the above regulations of the Board make plain, the Board construes Section 1004 (a) of the Act to be a requirement that it must in each instance where a hearing is required by statute afford the parties an opportunity to present argument to the Board and have such argument considered by it, but that the Board at its option may permit such argument to be submitted either orally or in writing. The Board has proceeded upon the assumption that there was no inflexible requirement that there be oral argument, and that in appropriate circumstances where such argument would not contribute to the proper disposition of the case, the Board need not hear oral argument.

In general terms, therefore, it is evident that if the *WJR* decision means that oral argument must be received in all matters where a hearing is required, the Board no longer possesses the administrative flexibility in relation to such matters which it has heretofore exercised. While oral argument has been the rule rather than the exception in proceedings where the Act provides for a hearing, the Board has on appropriate

course, the Board has dismissed a number of complaints without oral argument or other hearing pursuant to the express power vested in it by Section 1002 (a) upon a finding that the complaint did not state facts sufficient to warrant action on its part.

In the general field of what might be called procedural motions the imposition of a universal requirement of oral argument would work a substantial hardship on the Board. The most significant matters in this field are motions to intervene, which the Board has regularly disposed of without oral argument. The number of such petitions filed with the Board is very large, and the Board has on various occasions denied such motions, as well as granting them over formal opposition, without oral argument. If the Board were required to hear oral argument on all such motions where requested, a serious drain upon the Board's time could and probably would result therefrom.

A similar problem is presented by motions to consolidate applications in pending proceedings. Here again the Board ordinarily acts without hearing oral argument, and on many occasions has denied consolidations or granted them over objection without such argument. A similar approach is followed with regard to numerous preliminary procedural matters such as motions seeking definition of the scope of proceedings and

petitions for review for examiners' rulings as to evidence, issuance of subpoenas, and the like. Finally, petitions for reconsideration, rehearing and reargument are regularly disposed of without hearing any further argument, even though they purport to present a question of law with regard to the validity of the Board's action. There are a very large number of such petitions.

The *WJR* decision has already formed the basis for a number of demands upon the Board for oral argument and contentions of a legal right thereto in relation to practically all of the foregoing classes of matters. While we find it difficult to believe that the *WJR* case necessarily holds that the parties are entitled to oral argument in relation to all such matters, to the extent that it does so hold the additional demands upon the Board's time could not fail to hamper the performance of its duties under the Act and to slow down its processes in the face of an already overburdened docket. The nature and extent of the demands already made are indicative of the volume of requests for oral arguments on matters where such argument has not heretofore ordinarily been had or expected which is to be expected if the *WJR* decision is generally applicable in all of the foregoing types of situations.

In two appeals to the United States Court of Appeals, District of Columbia Circuit from orders of the Board, the *WJR* case is urged in support

## APPENDIX

### 285.8 *Hearings, Argument, Recommended Decisions, and Proceedings Subsequent Thereto.*

\* \* \* \*

(d) Exceptions to recommend decisions and supporting reasons therefor.

(1) Any party to the proceeding may take exceptions to the recommended decision. Exceptions to findings of fact shall designate, by exact and specific reference, the portions of the record which will be relied upon in support of such exceptions. Exceptions to conclusions of law shall briefly cite the statutory provisions or the principal authorities that will be relied upon in support of the exceptions to the conclusions of law.

(2) After the filing and exchange of exceptions, each party should prepare a single statement supporting its own exceptions and covering any points which it wishes to raise in connection with exceptions filed by others. Exceptions and supporting reasons therefor shall be filed with the Board and not with the examiner.

\* \* \* \*

(f) *Oral argument before the Board.*— If any person desires to argue a case orally before the Board he must request leave of the Board to make such argument. Such request should be filed with the briefs for the Board in the proceeding. The Board will advise the persons making such request as to its decision and if such argument is



to be allowed all persons who have filed briefs in the proceedings will be advised of the date and hour set for such argument and the amount of time allowed to each such person.

285.13 *Procedure in Rate Proceedings.*

\* \* \* \* \*

(7) After certification of the record to the Board and completion of any oral argument, the Board will issue a tentative decision. Exceptions to a tentative decision and supporting reasons therefor may be filed within such time as may be prescribed in the tentative decision. Oral arguments to the Board on exceptions to tentative decisions will be permitted only in unusual and exceptional instances for good cause shown, and upon request set forth in the document containing the exceptions and supporting reasons.

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*In the Supreme Court of the United States*

OCTOBER TERM, 1948

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

WJR, THE GOODWILL STATION, INC., AND COASTAL  
PLAINS BROADCASTING CO., INC., INTERVENOR-  
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS  
COMMISSION

# **In the Supreme Court of the United States**

OCTOBER TERM, 1948

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No. 495

**FEDERAL COMMUNICATIONS COMMISSION, PETITIONER**

*v.*

**WJR, THE GOODWILL STATION, INC., AND COASTAL  
PLAINS BROADCASTING CO., INC., INTERVENOR-  
RESPONDENT**

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUM-  
BIA CIRCUIT*

---

**REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS  
COMMISSION**

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1. Respondent insists that the Commission's failure to move to dismiss respondent's appeal and its position that respondent's right to resort to the courts for review of the correctness of the Commission's decision is an adequate constitutional safeguard (Br. 41) are admissions that respondent "has a standing before the Commission as an inter-



occasion dispensed with oral argument and decided cases on written argument alone. Consequently, some additional burden would result even in such cases were the *WJR* decision to be controlling.

A far greater impact would result, however, if the *WJR* case were deemed to require oral argument in the many situations where no statutory provision for hearing is made. As pointed out above, there are a number of situations in which the Act has authorized the Board to act without requiring notice and hearing. In such situations the Board has regularly proceeded upon the assumption that oral argument was not necessary to the disposition of the matter, even though a substantial question of law might be present. The Board has conducted itself accordingly, hearing oral argument only occasionally where there seemed to be special reason therefor. to require oral argument in all such matters would create a serious additional demand upon the time of the Board, without corresponding benefits in our opinion.

Perhaps the most important such category has been in the exercise of the Board's authority under Section 416 (b) of the Act to grant exemptions from the requirements of the Act. This power has been frequently invoked, and the Board has regularly denied applications for such exemptions, and also granted them despite the protests



of interested persons without allowing oral argument thereon. To hear oral argument in each such matter whenever requested by the applicant or an objector would impose a substantial burden of additional work on the Board as shown by the fact that during 1948 the Board disposed of 65 such applications, in none of which oral argument was heard.

Similarly, the Board is authorized to approve or disapprove, without hearing, contracts filed under Section 412, interlocking relationships filed under Section 409 (a), requests for suspension of service under Section 401 (k), requests for non-stop services and changes in service patterns and airports filed pursuant to regulation. Most of these result in approvals, and as a matter of practice the Board has frequently provided for hearing and oral argument before denying (or before granting over objection). However, in a substantial number of cases involving denial or grant over objection, oral argument is not heard by the Board prior to disposition of the matter.

With particular respect to your question whether the Board dismisses applications without oral argument, the Board has on a few occasions done so. The Board has on a number of occasions denied motions to dismiss without oral argument. Whether these actions are interlocutory in character and hence not covered by the *WJR* decision is difficult to ascertain. In addition, of

of contentions that the Board committed error. In *Seaboard & Western Airlines, Inc. v. Civil Aeronautics Board* (No. 10,089) the petitioner appealed from an order of the Board denying a request for exemption from the statutory requirements of the certificate of public convenience and necessity to engage in air transportation, contending that the failure to hear oral argument before dismissing the application constituted reversible error. In *Pan American-Grace Airways, Inc. v. Civil Aeronautics Board, et al.* (No. 9914) the petitioner appealed from an order of the Board denying a request for a hearing to determine whether the certificate of public convenience and necessity held by a competitor of petitioner should be suspended or modified. Although the Board heard oral argument before dismissing petitioner's application, petitioner contends that the oral argument as conducted did not meet the requirements of the *WJR* case.

As indicated above, it is our belief that Section 1004 (a) of the Act authorizes the Board to exercise a reasonable discretion in determining whether it will hear oral argument. To override the statute by imposing thereon a constitutional requirement of oral argument whenever a substantial question of law is presented would impose a rigidity which in our opinion is not required to protect private interests and would seriously hamper the Board's performance of its functions.

I hope that the foregoing provides you with the information that you desire. We would, of course, be happy to elaborate upon it in any way that would be helpful to you.

Sincerely yours,

Emory T. Nunneley, Jr.,  
EMORY T. NUNNELEY, Jr.,  
*General Counsel.*

Att. (1).

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— IN THE —

**Supreme Court of the United States**

OCTOBER TERM, 1948

—  
No. 495  
—

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

WJR, THE GOODWILL STATION, INC., *Respondent*.

—  
**Petition for a Writ of Certiorari to the United States Court  
of Appeals, District of Columbia Circuit.**

—  
**BRIEF FOR RESPONDENT IN OPPOSITION.**  
—

Respondent, WJR, The Goodwill Station, Inc., the appellant below, opposes the petition of the Federal Communications Commission for the issuance of a writ of certiorari to the United States Court of Appeals, District of Columbia, for review of its judgment entered in this case. Coastal Plains Broadcasting Company, Inc., the Applicant before the Commission and the Intervenor before the Court below, has not entered an appearance or filed any petition before this Court in this case.

ested party." (Respondent Br. 23). Whether or not this is so, it does not serve to resolve the issue tendered as to the validity of the procedure followed by the Commission. For there is no sharp line between a determination of the merits of respondent's claim of modification and the question of respondent's standing to seek review of a Commission decision adverse to it on this issue. At no time has the Commission suggested that respondent had not sufficient standing to seek relief from the Commission; its consistent position has been that the respondent is not entitled to relief. And while it may be that the respondent's claim is so obviously inadequate that a reviewing court could affirm the Commission not only on the merits but because of the respondent's lack of standing, the Commission has not seen fit to press that view. For, in any event, a judicial determination of the legal adequacy of the respondent's claim, whether couched in substantive terms or in terms of standing, is available.

Reference may be made, however, to the unsettled state of the law on the standing issue. In *Federal Communications Commission v. National Broadcasting Company (K O A)*, 319 U. S. 239, the issue of jurisdiction, not raised by the Commission in the court below or in this Court on petition for certiorari, was raised for the first time on argument in this Court, and was considered, since it was an issue which could not be foreclosed (319 U. S. 239,

246). On that issue, this Court held that K O A did have standing to appeal as a "person aggrieved" since it had established, and the Court concluded, that, in the light of the provisions of the rules governing the frequency to which it was assigned, its license would be modified by the Commission action appealed from. This decision does not, therefore, squarely decide the question of the standing, as a "person aggrieved", of a licensee who is able to make a factual showing of electrical interference to its service area beyond its protected contours but is not able to show that its license would be modified by the Commission action on which it seeks a hearing. The dissenting opinions in the *K O A* case (319 U. S. 239, 248, 264) plainly reflect a judgment that the mere existence of interference ~~within~~<sup>beyond</sup> the protected contours does not confer standing on the licensee. While the law on this issue is therefore not yet authoritatively settled for the purposes of the situation presented in this case, it is at least evident enough that, in the light of the *K O A* decision, the question of whether the respondent in fact properly alleged a threatened modification of its license, in the light of the applicable provisions of the Rules and Standards, must be judicially resolved. These issues have been presented to the court below on brief and arguments and are being presented to this Court. It is obvious enough that whatever the ultimate resolution of the issue of standing, respondent is having

its day in court on the question whether the Commission properly measured its interests as licensee. Certainly, the Commission cannot confer jurisdiction where it may not exist by the manner in which it couches its argument that its action was proper. See *United States v. Corrick*, 298 U. S. 435.

2. Respondent contends (Br. 27) that neither the statute, its license, nor the Commission's Rules and Regulations refer to the "100 uv/m contour". It follows, says the respondent, that there is no provision of law which limits the protection to which a Class I station is entitled to the 100 microvolt contour. But Section 3.28(a) of the Rules states explicitly that the "individual assignments of stations to channels which may cause interference to other United States stations, *shall be made in accordance with the standards of good engineering practice prescribed and published from time to time by the Commission \* \* \**" (italics supplied). See Appendix A to our main brief, pp. 58-59. These provisions are made applicable to Section 3.25(a) for the purpose of determining in what manner a Class II daytime station may be assigned on the frequency 760 kilocycles in accordance with the express provisions of Section 3.25(a) authorizing such assignments, without impairing the rights conferred on Class I stations on the channel.

Respondent also ignores the provision of Section 3.22(a) (main brief, p. 57) which defines a Class I station and the extent to which it is entitled to pro-



tection in terms of the provisions of Section 3.25 of the Rules and the provisions of the "Engineering Standards of Allocation." These Rules and their explicit reference to the Engineering Standards of Allocation make it clear enough that, whatever the status of other portions of the Commission's Standards of Engineering Practice, the provisions of the Engineering Standards of Allocation defining the extent of the protected service area of a Class I station are expressly incorporated into the Rules and Regulations.<sup>1</sup> Indeed, the respondent recognizes that there are provisions of the Standards "which are incorporated by reference in the rules and regulations and which have substantially the same meaning and effect as the rules and regulations." (Resp. br. 32, note 18.)

In the course of respondent's discussion of the "primary service" and "secondary service" areas defined by Rule 3.11 (Br. 28-32), it makes no allegation or showing that anything in the Standards with respect to these types of service areas affords

<sup>1</sup> Respondent alludes to a sentence in the form of application for a new standard broadcast station construction permit in use at the time Coastal Plains made application as showing that the Commission itself did not regard the provisions of the Rules and Standards defining protected contours and objectionable interference as having the binding status of Rules and Regulations (Br. 31). But in the light of the express provisions of the Commission's Rules discussed above and the decision of this Court in the *KOA* case, it is obvious enough that no weight can be given to a vestigial remnant of forms in use prior to the *KOA* decision, which has since been eliminated from the Commission's forms. See FCC Form 301 adopted October 16, 1947, 12 Fed. Reg. 7079; 1 Pike and Fischer, *Radio Regulation* 98:101.

any basis for a contention that a Class I-A licensee is entitled to protection outside its 100 microvolt contour during daytime hours. It is in its discussion of the "intermittent service" area that respondent seeks to stretch the protection of the Standards beyond the 100 microvolt contour. Thus, respondent assumes that because, under some circumstances, Class I stations may be entitled to protection in their intermittent service areas, it follows that respondent is entitled to protection in an intermittent service area which is admittedly outside its 100 microvolt contour. A fair reading of the *Standards* shows, however, that intermittent service areas of Class I stations are indeed protected, but only when they are within the 100 microvolt contour.

Section 3.11 of the Commission's Rules and Regulations states that "the term 'intermittent service area' of a broadcast station means the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading." Table I of the *Standards of Good Engineering* (page 5) describes what is meant by primary or satisfactory groundwave service and defines the field intensity of groundwave signals necessary to render adequate service in different types of geographical areas. For example, in a southern rural area during the summer, a signal of between 250 microvolts to 1000

microvolts per meter in intensity is required for satisfactory service. In such a locale, the outer boundary of the primary service area would be at the 250 microvolts per meter contour; from that point the intermittent service area would begin. In that situation, the 100 microvolts per meter contour of a Class I station would no longer be in the primary service area, but in the intermittent service area. But despite the fact that the 100 microvolts per meter contour may include intermittent service, the Commission's *Standards of Good Engineering* both by Table IV (Appendix A, main brief, p. 60) and express language on page 2 of the *Standards*, afford unqualified protection to such a station from objectionable interference up to the 100 microvolts per meter service contour. It is in this context that the Commission's *Standards of Good Engineering* state "only Class I stations are assigned for protection from interference from other stations *into* the intermittent service area." [italics supplied,]

3. Respondent seizes on the Commission's illustrative use of the holding of the court below on the insubstantiality of respondent's claim based on the pendency of the Clear Channel Hearing (Commission Br. 41), as a means of raising here for the first time issues which were not raised by respondent in its petition for rehearing (R. 14-16), or in its notice of appeal to the court below (R. 1-6), and certainly

not by way of a cross-petition for a writ of certiorari.<sup>2</sup>

Thus, respondent now alleges that the facts presented in its petition for rehearing also raised the issues whether the Commission's Public Notice of June 21, 1946, was invalid and whether the Commission improperly failed to add to the Coastal Plains grant a condition making it subject to a final determination in the Clear Channel Hearing (R. Br. 24-25). But respondent's reminiscences about issues which it might have raised cannot now take the place of timely allegations which do not appear in the petition for rehearing before the Commission and the notice of appeal (R. 14-16; 1-6).

4. The observations of Judge Learned Hand in the recent case of *Fay v. Douds*, 172 F. 2d 720, 725 (C. A. 2) are highly relevant to the issue presented for decision by the opinion of the court below:

Upon such a record the defendant's denial of any hearing was right. Neither the statute, nor the Constitution, gives a hearing where there is no issue to decide; and in the face of the correspondence it rested upon the Local at least to suggest some circumstances which would meet the case against it, to all appear-

<sup>2</sup> The Commission, of course, does not challenge the correctness of the decision of the court below that respondent's claim based on the pendency of the Clear Channel Hearing was insubstantial. It agreed both with the substance of the holding and its implicit approval of the Commission's disposition of that issue without oral argument.



ances impregnable.. The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests. Every summary judgment denies a trial upon issues formally valid. Where, as here, the evidence on one side is unanswerable, and the other side offers nothing to match or qualify it, the denial of a trial invades no constitutional privilege. These considerations are particularly appropriate when we consider that the Board must conduct its duties in a summary way; not, we hasten to add, without observing all the essentials of fair administration, but with as much dispatch as is consistent with those.

#### CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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*Federal Communications Commission.*

APRIL, 1949.

NO. 495.

IN THE

495

**Supreme Court of the United States**

OCTOBER TERM, 1948

FEDERAL COMMUNICATIONS COMMISSION; *Petitioner.*

WJR, THE GOODWILL STATION, INC., *Respondent.*

Petition for a Writ of Certiorari to the United States Court  
of Appeals, District of Columbia Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

LOUIS G. CALDWELL,  
DONALD C. BEELAR,  
PERCY H. RUSSELL, JR.

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## CITATIONS.

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## OPINIONS BELOW.

The Commission's order granting the application here at issue has not yet been reported. The decision and order of the Commission on Respondent's Petition for Reconsideration and Hearing (R. 20-24) has not yet been reported (R. 35-37). The opinion of the United States Court of Appeals, District of Columbia Circuit, entered October 7, 1948, has not yet been reported (R. 48-77). The judgment of the Court below was entered October 7, 1948 (R. 77-78).

## JURISDICTION.

The jurisdiction of this Court is invoked under Section 402 (e) of the Communications Act of 1934, as amended, 47-U. S. C. 402 (e), and under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. 347 (a).

## QUESTION PRESENTED.

Whether the Commission, without notice to Respondent or according it an opportunity for a hearing, may grant an application for a new radio broadcasting station to operate on the frequency channel then licensed to Respondent, and thereafter deny, *ex parte*, without opportunity for oral argument or for hearing, Respondent's petition for reconsideration and for hearing on such action, where Respondent's petition shows that its existing radio station's present interference-free service will be destroyed in extensive areas by interference to its usable signal from the proposed new station; i.e., whether Respondent, on the facts presented with respect to such action of the Commission, is a "person aggrieved or whose interests are adversely affected" thereby within the meaning of the Communications Act of 1934, as amended, Sections 312(b), 402(b), or 405, and is entitled to a hearing before the Commission prior to taking an appeal; or, at least, whether Respondent, as a matter of due process, is entitled to be heard, in oral argument, on the issues as to its right to notice and hearing.



under such Act and the Commission's Rules and Regulations thereunder.

## STATUTE AND REGULATIONS.

Certain sections of the Communications Act of 1934, as amended (47 U.S.C. 301-609) are set out in Appendix I hereto. Sections 1.382, 1.390, 1.893, 3.11, 3.22 and 3.25 of the Commission's Rules and Regulations in whole or in part are printed in Appendix II hereto. Relevant provisions of the Commission's Standards of Good Engineering Practice are reproduced in Appendix III.

## STATEMENT.

Respondent is the licensee of radio station WJR at Detroit, Michigan. For 20 years Respondent has been the licensee of station WJR. For 13 years Respondent has been licensed to operate as a Class I-A clear channel station, for which is authorized a minimum and maximum power of 50 kw. (Rules 3.22 and 3.25(a) Appendix II). Its frequency is 760 kc. During nighttime hours there is no station, other than WJR, operating within the continental United States on 760 kc. During daytime hours (prior to this case) there was no station, other than WJR, operating within the continental United States on 760 kc.<sup>1</sup>

On August 22, 1946 the Commission issued a release announcing its order<sup>2</sup> granting, without notice or hearing, the application of Tarboro (now Coastal Plains) Broadcasting Company, Inc., to construct a new station at Tarboro, North Carolina (543 miles southwest of Detroit) to operate day-

<sup>1</sup> F. C. C. List of Radio Broadcast Stations, Jan. 1, 1948, (16748); Television Digest, Jan. 1, 1949, P. 56.

<sup>2</sup> The Commission's original order was publicly released Aug. 22, 1946, and is as follows: "Public Notice No. 97431. Report No. 877. Broadcast action. August 22, 1946. Tarboro Broadcasting Co., Inc., granted CP for a new station to operate on 760 kc, 1 kw, daytime only (B3-P-4891)."

time with a power of 1000 watts on 760 kc, the frequency assigned to Respondent. This action was taken without notice to Respondent and without opportunity for hearing. The action was wholly *ex parte* and without any findings of fact.

On September 10, 1946 Respondent timely filed its Petition for Reconsideration and Hearing (R. 20-24) in accordance with Section 405 (Appendix I) and Rules 1.390 and 1.893 (Appendix II). Some three months later the Commission on December 17, 1946 released a Decision and Order denying Respondent's petition (R. 35-37). This action was taken without according Respondent any opportunity for hearing or for oral argument. In the meantime while Respondent's petition was still pending, the Commission on October 14, 1946 issued and delivered its construction permit (R. 30-32) to Coastal Plains. It was required under Paragraph 5 of the permit to commence construction by December 14, 1946 (R. 31).

From the order denying its petition, Respondent filed an appeal January 7, 1947 resulting in an opinion and judgment of the Court below reversing the Commission's order and decision.

The Commission's grant *ex parte* of the Coastal Plains application was made under a new interim policy which was announced during the pendency and prior to conclusion of a general rule-making proceeding. *In re Clear Channel Broadcasting Service*, Docket No. 6741 (R. 3-11, 37; see R. 12-16).

*The Clear Channel Proceeding.* Some years prior to the war Respondent, and the licensees of other clear channel stations, applied for an increase in power from 50 kw to 500 kw and sought modification of Rules to remove the 50 kw power ceiling and otherwise to improve and extend service and minimize interference limitations. In the early months of the war the Commission dismissed such applications, including Respondent's, *without prejudice*. This problem was left dormant, under the war-time freeze, until February 20, 1945 when the Commission issued its notice of

hearing in said Docket No. 6741 (R. 9-11) to which Respondent was a party as a member of the Clear Channel Broadcasting Service. The hearing was held in Docket No. 6741 beginning January 14, 1946 and ended October 31, 1947 within which period the Commission processed and granted the Coastal Plains application.

While this proceeding in said Docket No. 6741 was in progress and prior to its conclusion, the Commission on February 5, 1946 issued Public Notice 89273 (R. 12-14) announcing an interlocutory procedure as follows:

(a) Four categories of application for clear channel authorizations were dismissed, subject to reinstatement at the conclusion of the Clear Channel Proceeding, Docket No. 6741 (R. 13).

(b) As to applications requesting *daytime* operation (e.g. Coastal Plains) on a 1-A clear channel (e.g. 760 kc licensed to Respondent) the Public Notice provided that each such application would be considered individually on its merits, and, if it presented any complication with the issues in the Clear Channel Proceeding, its grant, if made, would be conditional (R. 13-14).<sup>3</sup>

<sup>3</sup> "The Commission has been concerned with the possibility that a grant of a large number of such applications would further complicate the problems that are involved in the Clear Channel Hearing. Further study of this matter has resulted in the conclusion that in many instances placing additional daytime only stations on the U. S. 1-A channels may not unduly complicate the problems, and accordingly all such applications will be considered individually on their merits. When no conflict with a resolution of the general problems that are at issue in the Clear Channel hearing can be foreseen, additional daytime assignments on U. S. 1-A channels may be made before conclusion of the hearing. It is, however, possible to foresee that severe complications may arise by authorizing the operation of additional limited time stations, and such applications will be given careful consideration with a view to determining the possible complications, and in the event they can be foreseen, the applications may be conditionally granted for daytime operation only."

The above policy on applications for daytime stations was modified by a second interlocutory procedure set forth in Public Notice 95034 of June 21, 1946 (R. 14-16) as follows:

(a) Action on applications for daytime stations located *more* than 750 miles from the Class I-A clear channel station would be withheld, pending conclusion of the Clear Channel Proceeding, Docket No. 6741.

(b) Applications for daytime stations located 750 miles or less from the Class I-A clear channel station would be considered individually on their merits, and "may be conditionally granted" (R. 15).<sup>4</sup>

Pursuant to the above policy announcement of June 21, 1946, the Commission two months later granted the Coastal Plain application (R. 37, 49). It proposed a Class II daytime only station on Respondent's Class I-A clear channel at Tarboro which is not more but *less* than 750 miles from Detroit (543 miles). This action was in accord with the

<sup>4</sup> Further consideration of the problems involved in making Class II station assignments on 1-A frequencies has resulted in a decision to adopt the following procedure: (1) The Commission will withhold action on all applications involving use of 1-A frequencies, daytime or limited time, where the proposed station is more than 750 miles from the dominant 1-A station using a non-directional antenna on the frequency requested or is outside the 0.5 mv/m 50% skywave contour of the dominant class 1-A station using a directional antenna on the frequency requested. (2) The Commission will consider on their individual merits applications involving use of 1-A channels, daytime or limited time, where the proposed station is 750 miles or less from the dominant 1-A station using a non-directional antenna on the frequency or is within the 0.5 mv/m 50% skywave contour of the dominant class 1-A station using a directional antenna on the frequency requested. Applications in this category will not at this time be granted limited time, but will be considered and may be conditionally granted for daytime operation only."



second part of the above procedure as to mileage separation, but was otherwise *not* in accord therewith since the consideration of this application on its merits was entirely *ex parte*, and its grant was *not* conditioned on disposition of the issues in the Clear Channel Proceeding, Docket No. 6741.

*Daytime Skywave Cases.* This case is but one of a group of eight cases which were similarly acted upon without notice or hearing, and in which petitions for rehearing were similarly denied without hearing or argument, and appeals were similarly taken to the Court below. See *FCC Fourteenth Annual Report for the Fiscal Year ending June 30, 1948, Page 14.*<sup>5</sup>

<sup>5</sup> *Skywave cases.*—These eight cases are discussed as a group since they are all appeals taken by the licensees of class I stations on clear channels who alleged that their stations would suffer daytime skywave interference by reason of the assignment of new stations operating daytime only on the same channels. In the first case, it was contended that the Commission's assignment of a daytime station on the channel presently assigned to Station WJR prior to the determination of the clear channel hearing was improper in that it prejudiced WJR's desire to apply for permission to operate with increased power. Oral arguments on three cases were held in which the Commission contended that under its existing Rules and Standards of Good Engineering Practice appellants were not entitled to protection against daytime skywave interference and had not been deprived of a right to hearing contrary to constitutional or any other legal requirements. All of these cases were pending in the United States Court of Appeals for the District of Columbia at the close of the fiscal year 1947: *Wilson, Inc. v. Federal Communications Commission*, No. 9434, U. S. Ct. of Appeals, D. C.; *Courier Journal & Louisville Times Co., Inc. v. Federal Communications Commission*, No. 9502, U. S. Ct. of Appeals, D. C.; *National Life & Accident Insurance Co. v. Federal Communications Commission*, Nos. 9510 and 9511, U. S. Ct. of Appeals D. C.; *WGN, Inc. v. Federal Communications Commission*, No. 9497, U. S. Ct. of Appeals, D. C.; *Crosley Broadcasting Corp. v. Federal Communications Commission*, No. 9501, U. S. Ct. of Appeals, D. C.; *WJR the Goodwill Station, Inc. v. Federal Commu-*

1. *L. B. Wilson, Inc. v. F. C. C. (D. C. Cir.)* No. 9434, April 12, 1948, 170 F. 2d 793. The Commission on May 10, 1946 granted, without a hearing, an application for a new daytime station at Philadelphia, Pa. on 1530 kc, the frequency licensed to Class I-B clear channel station WCKY at Cincinnati, Ohio. On November 14, 1946, the Commission denied without hearing or argument Station WCKY's petition for reconsideration and hearing. Its petition showed that Station WCKY would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. The Court below reversed the Commission.

2. *WJR, The Goodwill Station, Inc. v. F. C. C. (D. C. Cir.)* No. 9495, October 7, 1948, .... F. 2d. .... The Commission on December 5, 1946 granted, without a hearing, an application for a new daytime station at Clanton, Ala., on 760 kc, the frequency licensed to Class I-A clear channel station WJR, at Detroit, Mich. On February 20, 1947 the Commission denied, without hearing or argument, Station WJR's petition for reconsideration and hearing. Its petition showed that Station WJR would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. The Court below reversed the Commission.

3. *WGN, Inc. v. F. C. C. (D. C. Cir.)* No. 9497. The Commission on November 21, 1946 granted, without a hearing, an application for a new daytime station at Richmond, Va., on 720 kc, the frequency licensed to Class I-A clear channel station WGN at Chicago, Ill. On February 20, 1947 the Commission denied, without hearing or argument, Station WGN's petition for reconsideration and hearing. Its petition showed that Station WGN would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. This case is still pending in the Court below.

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*Communications Commission*, Nos. 9495 and 9496, U. S. Ct. of Appeals, D. C. On April 12, 1948, the court issued a decision in *L. B. Wilson v. Federal Communications Commission*, No. 9434, reversing the Commission and remanding that matter for further proceedings. The seven remaining skywave cases were still pending at the end of fiscal 1948.

4. *Crosley Broadcasting Corp. v. F. C. C.* (D. C. Cir.) No. 9501. The Commission on December 5, 1946 granted, without a hearing, an application for a new daytime station at St. Paul, Minn. on 700 kc, the frequency licensed to Class I-A clear channel station WLW at Cincinnati, Ohio. On February 20, 1947, the Commission denied, without hearing or argument, Station WLW's petition for reconsideration and hearing. Its petition showed that Station WLW would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. This case is still pending in the Court below.
5. *Courier Journal & Louisville Times Co., Inc., v. F. C. C.* (D. C. Cir.) No. 9502. The Commission on November 15, 1946 granted, without a hearing, an application for a new daytime station at Stillwater, Okla. on 840 kc, the frequency licensed to Class I-A clear channel Station WHAS at Louisville, Ky. On February 20, 1947 the Commission denied, without hearing or argument, Station WHAS's petition for reconsideration and hearing. Its petition showed that Station WHAS would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. This case is still pending in the Court below.
6. *WSM, Inc. v. F. C. C.* (D. C. Cir.) No. 9510. The Commission on September 20, 1946 granted, without a hearing, an application for a new daytime station at Altoona, Pa., on 650 kc, the frequency licensed to Class I-A clear channel Station WSM at Nashville, Tenn. On March 6, 1947, the Commission denied, without hearing or argument, Station WSM's petition for reconsideration and hearing. Its petition showed that Station WSM would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. This case is still pending in the Court below.
7. *WSM, Inc. v. F. C. C.* (D. C. Cir.) No. 9511. The Commission on September 19, 1946 granted, without a hearing, an application for a daytime station at Crewe, Va., on 650 kc, the frequency licensed to Class I-A clear channel station WSM at Nashville, Tenn. On March 6, 1947, the Commission denied, without hearing or argument, Station WSM's petition for reconsideration

and hearing. Its petition showed that Station WSM would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. This case is still pending in the Court below.

The common problem presented by this and the above seven cases is concerned with (1) daytime skywave service rendered by clear channel stations, and (2) interference from daytime only stations to the daytime groundwave or skywave signals of clear channel stations. The existence of such daytime service and interference is based upon engineering data presented by both government and industry radio engineering experts. This is the subject matter dealt with in the interim Public Notice of June 21, 1946 (R. 14-15).<sup>6</sup>

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<sup>6</sup> *Thirteenth Annual Report, F. C. C., Fiscal Year Ending June 30, 1947*, pp. 17-18: —“SKYWAVE INTERFERENCE. A large percentage of daytime stations have been authorized to operate on clear channels. Heretofore the matter of daytime skywave interference has been of no particular significance in that there were so few daytime stations and they were generally so far removed from the dominant clear channel stations that no interference was involved. As a result of the large number of daytime stations now in operation, however, interference to the dominant stations during the so-called transition period from nighttime to daytime and from daytime to nighttime has become a problem necessitating consideration. For the purpose of obtaining data on the subject, the Commission in June 1947 conducted a hearing in the matter of promulgating rules, regulations and standards concerning daytime skywave transmissions of standard broadcast stations (Docket 8333) which may necessitate further amendments and changes in the engineering standards to take care of interference of this nature. A decision with respect to recommended amendments had not been made at the close of the fiscal year.” Respondent was a party to said daytime skywave proceeding and the public record therein made prior to reargument of this case in the Court below established that operation of the Coastal Plains station will subject Station WJR's skywave and groundwave service to objectionable interference within its normally protected contour.



The instant case is in no way distinguishable from the above seven cases, except as to the *degree* of service and interference stated in the pleadings.<sup>7</sup> The Commission in this case bases its position on a provision of its Standards of Good Engineering Practice that "during daytime the Class I station is protected to the 100 uv/m groundwave contour" (Commission Petition pp. 26, 27). This position is now taken flat-footedly with the inference that if Respondent's affidavit had established interference within its 100 uv/m contour, the Commission would have accorded Respondent notice and hearing.

But in each of the other seven above-cited cases interference *was* established within the 100 uv/m contour, and, nevertheless, a hearing was denied, and the right thereto was contested in the Court below.

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<sup>7</sup> This difference is pointed up in the *concurring* opinion to the decision of the Court below in the 2nd above cited case, *WJR v. F. C. C.* (D. C. Cir. No. 9495) — F. 2d. —, as follows: PRETTYMAN, J., with whom EDGERTON, J., concurs, concurring: I concur in this opinion and decision. I make this separate statement in order to emphasize that this case, with No. 9434, *L. B. Wilson, Inc. v. Federal Communications Comm'n.*, decided April 12, 1948, and No. 9464, *WJR, The Goodwill Station, Inc. v. Federal Communications Comm'n.*, decided this day, together present all phases of the problem upon which the court differs in opinion. In the present case, the petitioner alleged that the proposed new station would cause substantial interference 'well within its 100 uv/m contour'; the supporting engineer's affidavit asserted the same interference and, indeed, showed it at the 200 uv/m contour. The opposition to that petition asserted that the alleged interference would not be from groundwave, and that normal protection, under the Commission's Standards, is against groundwave only. Examination of the Standards shows that the question thus presented was indeed substantial. There is a serious and debatable question whether the Standards, thus the licenses of all Class I clear channel stations, give protection against skywave in the daytime. Therefore, I agree that this appellant was entitled to a hearing before his petition was denied."

*WJR Service and Interference.* Respondent's petition before the Commission alleges that operation of the Coastal Plains station would subject the present interference-free service of Station WJR to objectionable interference (R. 20). The affidavit accompanying Respondent's petition established that (R. 22-24):

(a) *Middle States Area.* Station WJR delivers a useable daytime signal over all or a portion of the states of Indiana, Ohio, Pennsylvania and New York, which would be destroyed by interference from the proposed Coastal Plains station.

(b) *Lower Michigan Area.* Station WJR delivers a useable daytime signal over lower Michigan which in all or a portion of 12 counties in the northern part would be destroyed by interference from the proposed Coastal Plains station. This area includes all of Leelanau, Charlevoix and Cheboygan counties in which there are no broadcast stations, all of Emmet county in which there is one local station (WMBN), and a part of eight other counties in only two of which are stations (WKLA, WTCM), both local.

(c) *Upper Michigan Area.* Station WJR delivers a useable daytime signal over all of the 14 counties of upper Michigan, which would be destroyed by interference from the Coastal Plains station. In seven of these counties there are no radio stations. (There is one local station in each of the other seven counties, WJMS, WSUD, WHDF, WOMJ, WJPD, WMIQ and WDBC).

Over most of the Middle States area above where WJR's present interference-free service would be destroyed, it was conceded that a better signal is provided by other stations. But with respect to both the lower Michigan area and the upper Michigan area above, WJR provides "the best signal available" to most of this region. (The portion excluded

would be the built-up city areas and that within the service of the ten local stations.) Also with regard to the lower and upper Michigan area described above, it is established that:

(a) This area is unusually free of atmospheric noise with the result that a very low order of signal will provide an acceptable service, (R. 24) and

(b) In this area WJR is in fact "the most listened to station" based upon the Commission's own Radio Survey compiled for it by the Bureau of Census (R. 23).

The record in this case establishes that station WJR in fact delivers a groundwave service over the three above-described areas, which under Rule 3.11 (Appendix II) constitute a portion of Respondent's "primary service area" or "intermittent service area" or both. (Subsequent proceedings established that WJR also provides a secondary service daytime over a more extensive area). And the record in this case also establishes that the operation of the Coastal Plains station will cause interference which will destroy WJR's service within such areas.

## ARGUMENT.

### I.

Petitioner's statement of the "Question Presented" (p. 2) quite ignores the facts of record and includes an assumption that no case is presented. This begs the issue as to whether the facts of record raise any substantial question, and whether that issue should be heard initially by the Commission or on appeal.

On the facts stated Respondent is an interested party to the Commission's action and entitled under the statute and regulations to notice and hearing on issues of fact or law as follows:

(a) Grant of the Coastal Plains application constituted an indirect modification of Respondent's license,

which, without prior notice to Respondent and opportunity for hearing, is contrary to Section 312(b) and Rule 1.382 as established in *F.C.C. v. National Broadcasting Company*, 319 U. S. 239; (see *F.C.C. v. Sanders Brothers Radio Station*, 309 U. S. 470 and *Ashbacker Radio Corporation v. F.C.C.*, 326 U. S. 339).

- (b) Grant of the Coastal Plains application would not serve public convenience, interest, or necessity within the meaning of Section 319(a) and Rules 1.382 and 1.390 by reason of the resulting loss of service to the public being rendered by Respondent's station in the lower and upper areas of Michigan above stated (p. 12).
- (c) Respondent's petition showed that it is a "person aggrieved or whose interests are adversely affected" by the Commission's action within the meaning of Sections 405 and 402(b) and Rule 1.390, and was, therefore, a person entitled to notice and hearing.
- (d) Respondent station, in the above-described lower and upper Michigan areas (p. 12) renders an interference-free primary service or intermittent service as defined in Rule 3.11, that such service over much of these areas is the best service available and in fact the most listened to service (R. 23, p. 13) and that such service is recognized under the Commission's Standards of Good Engineering Practice, Appendix I B, D and F, and grant of the Coastal Plains application would subject Respondent's service to objectionable interference.
- (e) The interlocutory procedure set forth in the Commission's Public Notice of June 21, 1946 (R. 14-16, p. 6), pursuant to which the Commission denied Respondent's petition (R. 37, 49), is not a valid statutory rule or regulation promulgated under and pursuant to procedure set forth in Section 303(f) or the Administrative Procedure Act (5 U. S. C. 1002), and



that the provision thereof for duplicating daytime stations on Class I-A clear channel assignments which are separated less than 750 miles, is arbitrary and capricious and wholly unsupported by any findings of fact and not supported by a final action in any rule-making proceeding.

- (f) In any event the Commission's action is contrary to the express provision of such Public Notice of June 21, 1946 which stated that if any daytime duplication is authorized, the grant would be conditional (R. 15, p. 6). The permit granted Coastal Plains contains no such condition (R. 30-32)<sup>s</sup> so as to avoid any conflict with final resolution of the issues in the Clear Channel Proceeding, Docket No. 6741 (R. 12-16, pp. 5, 21). The failure to make the Coastal Plains grant subject to such condition, e.g. as set out in Respondent's license for similar purposes, (R. 17 and 33) is prejudicial to Respondent's interest as a party to said Docket No. 6741 proceeding. To illustrate, if the conclusion on issues No. 3, 7 and 8 thereof (R. 9-11) results in regulations authorizing Respondent's station an increase in power, such authorization would present an interference conflict with the Coastal Plains station which could prevent the grant of Respondent's application therefor without indirect modification of the Coastal Plains license.

<sup>s</sup> A condition for the purpose of protecting the Commission and interested parties pending final action in the pending rule-making proceeding, Docket 6741, which has been employed in other grants, would provide: "The Commission reserves the right during said license period, of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period." (R. 17, 33.)

- (g) Respondent's petition shows that under Rules 3.22 and 3.11 the "primary service area" of its station is entitled to be "free from objectionable interference from other stations on the same, and adjacent channels . . . .". The remaining part of Rule 3.22 pertains to "secondary service area" and a reading of that Rule shows that the reference therein to "Engineering Standards of Allocation" is limited to such secondary service (nighttime skywave service which is not at issue, here). The Commission's statutory Rules and Regulations contain no provision limiting the primary service area of a Class I-A station to its 100 uv/m contour. Such provision is found in the Commission's Standards (Appendix IIIA) but even assuming this provision to be incorporated by reference into Rule 3.22 as pertaining to primary service, this is qualified and inconsistent with other provisions of such Standards, e.g. Appendix III B, D, F and G.
- (h) If the Commission's Standards are considered to be controlling Respondent's petition shows that its primary service is entitled to protection from objectionable interference under other provisions of such Standards. For example, over much of the lower and upper Michigan area, WJR renders an adequate signal and in fact the best signal available and is the most listened to station (R. 21, 23, p. 13) which is *prima facie* in accord with such Standards, Appendix III B and G. Moreover these Standards, Appendix III D and F recognize and provide for intermittent service as defined in Rule 3.11 in the case of a Class I-A clear channel.
- (i) The minimal facts of record show that Respondent's petition raised a question as to the balance of public convenience, interest, or necessity, between station WJR's existing service and the proposed new service, under Section 319(a) and Rules 1.382 and 1.390,

the determination of which warranted and required that Respondent be accorded notice and opportunity for hearing.

It should be quite obvious that the above issues, when associated with the first instance of a duplication of any station on Respondent's assignment, make out a substantial question upon which, at least, Respondent was entitled to the minimal right of oral argument on its petition before the Commission on the issue of whether it was entitled to notice and hearing.

A contrary rule would conflict with the basic pattern of administrative proceedings and judicial review thereof, and result in a party having its first hearing on appeal instead of before the administrative agency in which is vested initial and primary jurisdiction.

## II.

This case is clearly distinguishable from all cases cited by Petitioner (pp. 10-11).

If Respondent was a party in interest to the Commission's action, it was entitled to "be made a party to the proceeding." *FCC v. National Broadcasting Company, supra* (319 U. S. 239, 245). This distinguishes the interest of Respondent in this case from those who sought to intervene in the various *Tide Land Cases* cited by Petitioner.

In the *Morgan Case*, 298 U. S. 468, the interested parties therein were accorded a notice and hearing. This Respondent was not, nor was it allowed an oral argument on the question of its right to a hearing.

The same distinction exists with respect to *N.L.R.B. v. Mackay R. & T. Co.*, 304 U. S. 351. The same is true with respect to *Consolidated Edison Co. v. N.L.R.B.*, 305 U. S. 197. In both *Sproul v. F.R.C.*, 54 F. 2d 444, and *W.O.W.L.L.A. v. F.R.C.*, 65 F. 2d 484, the appellants had a notice and hearing. In *Peoria Braumeister Co. v. Yellow-ley*, 123 F. 2d 637, the permittee had due notice of new regu-

lations which, if it had taken advantage of, accorded it the right of notice and hearing. (This permittee did not even take advantage of the opportunity for oral argument of its case on appeal). *State ex rel. School District 8 v. Cary*, 166 Wis. 103, is clearly inapplicable since it pertains to procedural rights under a state law between two agencies of government, namely a School District and the State Superintendent of Schools, as to which matter we would presume the state law to be conclusive however interpreted by the courts of that State.

In the instant case, Respondent was deprived of any notice, had no hearing before an examiner or the Commission and was denied any hearing or argument as to its rights thereto. On this record, therefore, this case is similar to the *KOA Case*, *E.C.C. v. N.B.C. supra*, with but two material differences.<sup>9</sup> That case was concerned with nighttime duplication on a clear channel assignment and interference to a secondary service, whereas this case is concerned with daytime duplication and interference to primary and intermittent service. Second, in that case the Commission's action appeared to be in conflict with its own statutory regulations, whereas in this case the Commission's action is not supported by any express provision of its statutory regulations but is premised on a press release procedure (R. 37, 49) published on a subject at issue in a pending rule-making proceeding prior to its completion, and on a provision of an ancillary document of engineering practices, the status of which as a rule or regulation,<sup>10</sup> is at is-

<sup>9</sup> A hearing was held in the *KOA Case* but it was not permitted to appear or participate (241), and it was later allowed to file a brief and present oral argument, *amicus curiae* (242, 246), neither of which was allowed this Respondent.

<sup>10</sup> The non-statutory character of the Commission's Standards, as contrasted with its Rules and Regulations, is established by the Commission's statement thereon at the time of their original issue in 1939. *Fifth Annual Report, F. C. C. Fiscal Year ending June 30, 1939*, p. 41: "Scope of Standards of Good Engineering Prac-



and other provisions of which support Respondent's position as an interested party to the Commission's action as set forth in its petition.

This case and the *KOA Case* are otherwise similar. In both the issue involved the interpretation and application of Section 312(b) and the provisions of Rules and Regulations on the duplication of stations on clear channel assignments and questions of service and interference. In both the Commission refused to recognize the existing licensee as a party in interest, and denied petitions for hearing.

### III.

Are the interests of a party and the issue of a substantial question to be determined upon a consideration of the statutory standard of public interest and public service, or upon a microvolt concept of non-statutory engineering practices?

The Commission's position here is based on a microvolt

---

“Necessity for the standards arises by reason of the fact that all of the technical principles of allocation, and use of facilities cannot be incorporated in the rules and regulations, because of the rapid changes taking place. The rules and regulations cover only the basic and more general principles. To obtain uniformity in presenting technical data on all applications concerning standard broadcast stations, it is necessary that the Commission enunciate the manner and method in which the data shall be presented. This provides a distinct advantage in the administration of the technical regulations, greatly improves the uniformity of action on formal applications, and serves as a guide to engineers. Many of the standards set out certain methods of compiling and submitting data. The provisions of the Standards may be divided into three classes, as follows: (1) Those provisions which are incorporated by reference in the rules and regulations and which have substantially the same meaning and effect as the rules and regulations. (2) Those provisions which go beyond the rules and regulations so as to disclose policies and principles of allocation and regulation. (3) Those provisions which are included primarily as a guide to applicants and licensees.”

concept. It, and the minority opinion of the Court below, state: Respondent did not claim interference within the 100 mv/m contour; under the Commission's Standards of Good Engineering Practice a "Class I station is protected to the 100 mv/m groundwave contour" (Appendix III A); and, therefore, Respondent failed to state a case or raise a substantial question. (Compare Minority Opinion, R. 65-77, with footnote 7). The Commission's position is therefore based on an arbitrary difference of 68 microvolts, and in disregard of the facts shown that over the areas in question Respondent's stations render a satisfactory and usable service which interference resulting from the Commission's action would destroy.

Public interest and public service considerations under the statute and the Commission's statutory regulations clearly support Respondent's position as a party in interest. For example, the Commission could find and conclude, after a hearing on the Coastal Plains application, that considerations of public interest warrant and require a denial, since a grant would cause objectionable interference to an existing interference-free service being rendered by station WJR to extensive areas in northern and upper Michigan over much of which no other service is available and where, in fact, WJR delivers a usable service and is the "most listened to station".

If the statutory standard, when applied to the issues presented, is broad enough to support a determination either way by the Commission, then it should be sufficiently broad to qualify Respondent as a party in interest to a proceeding for the determination of such issues.

The Commission's position is not supported by any provision of statute or of its statutory regulations. Its Standards do not and are not intended to have the status of statutory regulations (fn. 10); or, at least, there is a substantial question as to their status, as well as the status of the Public Notice of June 21, 1946 (R. 14-16). But setting this

question aside; a consideration of both shows that they recognize the position of Respondent as an interested party.

(a) As to said Public Notice the Commission states: "It is, however, possible to foresee that severe complications may arise by authorizing the operation of additional limited time stations." (R. 14), and "Applications in this category will not at this time be granted limited time, but will be considered and may be conditionally granted for daytime operation only." (R. 15) (See also fn. 6).

(b) As to the Standards, one provision recognizes that "Class I stations render service to all three service areas" (Appendix III D), including "intermittent service", as defined in Rule 3.11 (c), which Respondent's petition shows it is rendering over the areas in question. Another provision states that such service "may be down to only a few microvolts in certain areas" and that "*Only Class I stations are assigned for protection from interference from other stations into the intermittent service area.*" (Appendix III F).

Respondent's petition shows that northern and upper Michigan is an area where a signal of a few microvolts does in fact provide a usable and popular service. Moreover, with respect to some sixteen Counties in such area, Respondent's petition made out a case requiring a hearing under the express terms of another provision of such Standards (Appendix III B).

In contrast to the Commission's position here, it is significant that neither the statute nor statutory regulations empirically attempt to measure public service or the interest of a party in terms of microvolts. Also the microvolt concept relied on here is exactly opposite to the position taken by the Commission in denying any hearing on the seven companion daytime skywave cases where interference was shown within the 100 uv/nt contour.

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A fair and realistic consideration of the facts set forth in Respondent's petition under the statute and the statutory regulations, and also under the Standards if they be material, clearly establishes that Respondent's existing interference-free service over extensive areas should not be destroyed arbitrarily by an *ex parte* action.

On this issue the Court below held:

"We conclude that under the due process clause of the Fifth Amendment WJR is entitled to a hearing before the Commission as to the sufficiency of the allegations of its petition for reconsideration, assuming their truth, to show indirect modification of its license by the granting of the Coastal Plains application."

The rationale of this rule is clear. It does not require that every stranger to a case is entitled to a hearing. It does provide, and correctly so, that a person who shows that he will be aggrieved or injured by an action, is entitled to a hearing, or, as a minimal right, to a hearing on the question of his status as an interested party. Had Respondent's petition failed to show the loss of any interference-free service it would have had no standing either before the Commission or an appeal. Where such showing is made, a party is entitled to be heard. Where the showing made is dependent on a construction of a statute or regulation, a party is entitled at least to oral argument on the issues as to its interest and right of hearing.

The characterization given to the opinion of the Court below by the Petitioner (Pet. pp. 7-9) is altogether too sweeping. The contention of the Petitioner that it and other agencies will have "no leeway or discretion whatever to make summary disposition of pleadings that are insubstantial or frivolous" is clearly unwarranted and is denied by the Commission's own actions in recent cases, e.g. Memorandum Opinion and Order, *In Re: Northern Corporation (WMEX)*, Docket No. 8911, Nov. 3, 1948; Memorandum Opinion and Order, *In re: New England Theatres, Inc.* Docket No. 8557, Jan. 18, 1949, wherein petitions, (which



were neither insubstantial or frivolous were denied without hearing or argument on grounds, not that the opinion in this case is not final, but that such cases were distinguishable from the opinion of the Court below in this case. ♦

### CONCLUSION.

For these reasons set forth above, it is submitted respectfully that the petition for writ of certiorari should be denied.

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## APPENDIX I—STATUTE.

### COMMUNICATIONS ACT OF 1934.

#### Sec. 303

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall— \* \* \*

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with; \* \* \*"

#### Sec. 312(b)

"Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

#### Sec. 319(a)

"No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written applica-

tion therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation."

Sec. 402(a) \* \* \*

(b) "An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

- (1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.
- (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

Sec. 405

"After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor

be made to appear: *Provided, however,* That in the case of a decision, order, or requirement made under Title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby.. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order."



## APPENDIX II—RULES AND REGULATIONS

### FEDERAL COMMUNICATIONS COMMISSION RULES AND REGULATIONS

#### I—PRACTICE AND PROCEDURE:

1.382 "Grants without a hearing.—(a) Where an application for radio facilities is proper upon its face and where it appears from an examination of the application and supporting data that (a) applicant is legally, technically, and financially qualified; (b) a grant of the application would not involve modification, revocation, or nonrenewal of any existing license or outstanding construction permit; (c) a grant of the application would not cause additional electrical interference to an existing station or stations for which a construction permit is outstanding within its normally protected contour as prescribed by the applicable Rules and Regulations; (d) a grant of the application would not preclude the grant of any mutually exclusive application; and (e) a grant of the application would be in the public interest, the Commission will grant the application without a hearing."

1.390 "Petitions for reconsideration or for rehearing.—(a) Where an application has been granted without a hearing, any person aggrieved or whose interests would be adversely affected thereby may file a petition for reconsideration of such action. Such petition must be filed with the Commission within 20 days after public notice is given of the Commission's action in granting the application. Such petition will be granted if the petitioner shows that:

(1) Petitioner is an existing licensee or permittee and a grant of the application would require the modification, revocation, or nonrenewal of his license or construction permit; or

(2) That petitioner is an existing licensee or permittee and a grant of the application would cause interference to his station within the normally protected contour as prescribed by applicable Rules and Regulations; or

(3) At the time the application was granted, petitioner had a mutually exclusive application pending before the Commission; or

(4) A grant of the application is not in the public interest."

1.892 "Contents; relief requested.—(a) \* \* \*

(b) The petition for rehearing may request (1) reconsideration, either in cases decided after hearing or in cases of applications granted without hearing under title III of the act; (2) reargument; (3) reopening of the proceeding; (4) amendment of any finding, or (5) other relief. Such petition shall be specific as to the form of relief sought and, subject to this requirement, may contain alternative requests.

## II. A. RULES GOVERNING STANDARD BROADCAST STATIONS

3.11 "Service areas.—(a) The term 'primary service area' of a broadcast station means the area in which the groundwave is not subject to objectionable interference or objectionable fading.

(b) The term 'secondary service area' of a broadcast station means the area served by the skywave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity.

(c) The term 'intermittent service area' of a broadcast station means the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading."

3.22 "Classes and power of standard broadcast stations. (a) Class I station.—A Class I station is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in

3.25 or in accordance with the Engineering Standards of Allocation. The operating power shall be not less than 10 kilowatts nor more than 50 kilowatts. (Also see Sec. 3.25(a) for further power limitation.)

3.25 Clear channels: Class I and II stations.—The frequencies in the following tabulations are designated as clear channels and assigned for use by the classes of stations given:

(a) To each of the channels below there will be assigned one Class I station and there may be assigned one or more Class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 750, 760, 770, 780, 820, 830, 840, 870, 880, 890, 1020, 1040, 1100, 1120, 1160, 1180, 1200, and 1210 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kilowatts.

## APPENDIX III STANDARDS

### FEDERAL COMMUNICATIONS COMMISSION STANDARDS OF GOOD ENGINEERING PRACTICE CONCERNING STANDARD BROADCAST STATIONS

(Revised to October 30, 1947.)

#### ENGINEERING STANDARDS OF ALLOCATION

- (2) "From an engineering point of view, Class I stations may be divided into two groups:

(A)

(a) The Class I stations in Group 1 are those assigned to the channels allocated by section 3.25, paragraph (a), on which duplicate nighttime operation is not permitted, that is, no other station is permitted to operate on a channel with a Class I station of this group within the limits of the United States (the Class II stations assigned the channels operate limited time or daytime only), and during daytime the Class I station is protected to the 100  $\mu\text{v}/\text{m}$  ground-wave contour. Protection is given this class of station to the 500  $\mu\text{v}/\text{m}$  groundwave contour from adjacent channel stations for both day and nighttime operations.<sup>2</sup> The power of each such Class I station shall not be less than 50 kw.

(B)

"When it is shown that primary service is rendered by any of the above classes of stations, beyond the normally protected contour, and when primary service to approximately 90 percent of the population (population served with adequate signal) of the area between the normally-protected contour and the contour to which such station actually serves, is not supplied by any other station or stations carrying the same general program service, the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration."



(C)

"When a station is already limited by interference from other stations to a contour of higher value than that normally protected for its class, this contour shall be the established standard for such station with respect to interference from all other stations."

(D)

"The several classes of broadcast stations have in general three service areas; namely, primary, secondary, and intermittent service areas. Class I stations render service to all three service areas."

### SECONDARY SERVICE

(E)

"Secondary service is delivered in the areas where the skywave for 50 percent or more of the time has a field intensity of 500 uv/m or greater. It is not considered that satisfactory secondary service can be rendered to cities unless the skywave approaches in value the groundwave required for primary service. The secondary service is necessarily subject to some interference and extensive fading whereas the primary service area of a station is subject to no objectionable interference or fading. Class I stations only are assigned on the basis of rendering secondary service."

### INTERMITTENT SERVICE

(F)

"The intermittent service is rendered by the groundwave and begins at the outer boundary of the primary service area and extends to the value of signal where it may be considered as having no further service value. This may be down to only a few microvolts in certain areas and up to several millivolts in other areas of high noise level, interference from other stations, or objectionable fading at night. The intermittent service area may vary widely from day to night and generally varies from time to time as the name implies. Only Class I stations are assigned

for protection from interference from other stations into the intermittent service area.

(G)

"TABLE IV. Protected service contours and permissible interference signals for broadcast stations."

(See Appendix to Petition of Federal Communications Commission for Writ of Certiorari, Page 27)

### ANNEX III

#### INTERFERENCE FROM SKYWAVE SIGNALS

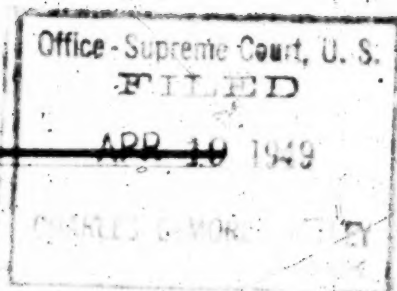
(H)

(Note: The nine paragraphs under this heading deal with skywave interference, but they are silent as to any distinction between *daytime* skywave interference or *nighttime* skywave interference.)

BRIEF FOR  
WJR,  
the Goodwill  
Station, Inc.

LIBRARY  
SUPREME COURT

NO. 495



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

WJR, THE GOODWILL STATION, INC., *Respondent*,  
(COASTAL PEAKS BROADCASTING CO., INC., *Intervenor*).

On Writ of Certiorari to the United States Court of  
Appeals for the District of Columbia Circuit.

BRIEF FOR WJR, THE GOODWILL STATION, INC.

LOUIS G. CALDWELL,

DONALD C. BEFLAE,

PERCY H. RUSSELL, JR.,

*Counsel for Respondent.*



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channel station would be withheld, pending conclusion of the Clear Channel Proceeding, Docket No. 6741.

(b) Applications for daytime stations located 750 miles or less from the Class I-A clear channel station would be considered individually on their merits, and, if granted, would be conditional (R. 11).<sup>5</sup>

Pursuant to the above policy announcement of June 21, 1946, the Commission two months later granted the Coastal Plains application (R. 37, 49). It proposed a Class II daytime only station on Respondent's Class I-A clear channel at Tarboro which is not more but *less* than 750 miles from Detroit (543 miles). This action was in accord with the second part of the above procedure as to mileage separation, but was otherwise *not* in accord therewith since the consideration of this application on its merits was entirely *ex parte*, and its grant was *not* conditioned on disposition of the issues in the Clear Channel Proceeding, Docket No. 6741 (n. 14). (By a subsequent Commission Notice of May 9, 1947, it set aside the procedure provided in the Notice of June 21, 1946, and postponed action or consideration on all applications similar to Coastal Plains until conclusion and decision on Clear Channel Proceeding. See n. 17.)

<sup>5</sup> The said Public Notice states: "Further consideration of the problems involved in making Class II station assignments on I-A frequencies has resulted in a decision to adopt the following procedure: (1) The Commission will withhold action on all applications involving use of I-A frequencies, daytime or limited time, where the proposed station is more than 750 miles from the dominant I-A station using a non-directional antenna on the frequency requested or is outside the 0.5 mv/m 50% skywave contour of the dominant class I-A station using a directional antenna on the frequency requested. (2) The Commission will consider on their individual merits applications involving use of I-A channels, daytime or limited time, where the proposed station is 750 miles or less from the dominant I-A station using a non-directional antenna on the frequency or is within the 0.5 mv/m 50% skywave contour of the dominant class I-A station using a directional antenna on the frequency requested. Applications in this category will not at this time be granted limited time, but will be considered and may be conditionally granted for daytime operation only."

Daytime Skywave Cases. This case is but one of a group of eight cases which were similarly acted upon without notice or hearing, and in which petitions for rehearing were similarly denied without hearing or argument, and appeals were similarly taken to the Court below. See *FEC Fourteenth Annual Report for the Fiscal Year ending June 30, 1948, Page 14.*<sup>6</sup>

1. *L. B. Wilson, Inc. v. F. C. C.* (D. C. Cir.) No. 9434, April 12, 1948, 170 F. 2d 793. The Commission on May 10, 1946 granted, without a hearing, an application for a new daytime station at Philadelphia, Pa., on 1530 kc, the frequency licensed to Class I-B clear channel sta-

<sup>6</sup> "Skywave cases.—These eight cases are discussed as a group since they are all appeals taken by the licensees of Class I stations on clear channels who alleged that their stations would suffer daytime skywave interference by reason of the assignment of new stations operating daytime only on the same channels. In the first case, it was contended that the Commission's assignment of a daytime station on the channel presently assigned to Station WJR prior to the determination of the clear channel hearing was improper in that it prejudiced WJR's desire to apply for permission to operate with increased power. Oral arguments on three cases were held in which the Commission contended that under its existing Rules and Standards of Good Engineering Practice appellants were not entitled to protection against daytime skywave interference and had not been deprived of a right to hearing contrary to constitutional or any other legal requirements. All of these cases were pending in the United States Court of Appeals for the District of Columbia at the close of the fiscal year 1947: *Wilson, Inc. v. Federal Communications Commission*, No. 9434, U. S. Ct. of Appeals, D. C.; *Courier Journal & Louisville Times Co. v. Federal Communications Commission*, No. 9502, U. S. Ct. of Appeals, D. C.; *National Life & Accident Insurance Co. v. Federal Communications Commission*, Nos. 9510 and 9511, U. S. Ct. of Appeals D. C.; *WGN, Inc. v. Federal Communications Commission*, No. 9497, U. S. Ct. of Appeals, D. C.; *Crosley Broadcasting Corp. v. Federal Communications Commission*, No. 9501, U. S. Ct. of Appeals, D. C.; *WJR, The Goodwill Station, Inc. v. Federal Communications Commission*, Nos. 9495 and 9496, U. S. Ct. of Appeals, D. C. On April 12, 1948, the court issued a decision in *L. B. Wilson v. Federal Communications Commission*, No. 9434, reversing the Commission and remanding that matter for further proceedings. The seven remaining skywave cases were still pending at the end of fiscal 1948.

tion WCKY at Cincinnati, Ohio: On November 14, 1946, the Commission denied without hearing or argument Station WCKY's petition for reconsideration and hearing. Its petition showed that Station WCKY would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. The Court below reversed the Commission.

2. *WJR, The Goodwill Station, Inc. v. F. C. C.* (D. C. Cir.) No. 9495, October 7, 1948, .... F. 2d. .... The Commission on December 5, 1946 granted, without a hearing, an application for a new daytime station at Clanton, Ala., (670 miles from Detroit) on 760 kc, the frequency licensed to Class I-A clear channel station WJR, at Detroit, Mich. On February 20, 1947, the Commission denied, without hearing or argument, Station WJR's petition for reconsideration and hearing. Its petition showed that Station WJR would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. The Court below reversed the Commission.

3. *WGN, Inc. v. F. C. C.* (D. C. Cir.) No. 9497. The Commission on November 21, 1946 granted, without a hearing, an application for a new daytime station at Richmond, Va., on 720 kc, the frequency licensed to Class I-A clear channel station WGN at Chicago, Ill. On February 20, 1947 the Commission denied, without hearing or argument, Station WGN's petition for reconsideration and hearing. Its petition showed that Station WGN would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. This case is still pending in the Court below.

4. *Crosley Broadcasting Corp. v. F. C. C.* (D. C. Cir.) No. 9501. The Commission on December 5, 1946 granted, without a hearing, an application for a new



daytime station at St. Paul, Minn., on 700 kc, the frequency licensed to Class I-A clear channel station WLW at Cincinnati, Ohio. On February 20, 1947, the Commission denied, without hearing or argument, Station WLW's petition for reconsideration and hearing. Its petition showed that Station WLW would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. This case is still pending in the Court below.

5. *Courier Journal & Louisville Times Co., Inc., v. F. C. C.* (D. C. Cir.) No. 9502. The Commission on November 15, 1946 granted, without a hearing, an application for a new daytime station at Stillwater, Orla., on 840 kc, the frequency licensed to Class I-A clear channel station WHAS at Louisville, Ky. On February 20, 1947 the Commission denied, without hearing or argument, Station WHAS's petition for reconsideration and hearing. Its petition showed that Station WHAS would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. This case is still pending in the Court below.

6. *WSM, Inc. v. F. C. C.* (D. C. Cir.) No. 9510. The Commission on September 20, 1946 granted, without a hearing, an application for a new daytime station at Altoona, Pa., on 650 kc, the frequency licensed to Class I-A clear channel station WSM at Nashville, Tenn. On March 6, 1947, the Commission denied, without hearing or argument, Station WSM's petition for reconsideration and hearing. Its petition showed that Station WSM would be subjected to interference within its normally protected contour. — F. C. C. Rep. —. This case is still pending in the Court below.

7. *WSM, Inc. v. F. C. C.* (D. C. Cir.) No. 9511. The Commission on September 19, 1946 granted, without a hearing, an application for a daytime station at Crewe, Va., on 650 kc, the frequency licensed to Class I-A

clear channel station WSM at Nashville, Tenn. On March 6, 1947, the Commission denied, without hearing or argument, Station WSM's petition for reconsideration and hearing. Its petition showed that Station WSM would be subjected to interference within its normally protected contour. — F. C. C. Rep. — This case is still pending in the Court below.

The common problem presented by this and the above seven cases is concerned with (1) daytime service rendered by clear channel stations, and (2) interference from daytime only stations to the signals of clear channel stations.

In this case and in the other above-cited seven companion cases the Commission duplicated clear channel station assignments by the granting of daytime only stations pursuant to the interim procedure as announced on February 5,

The Clear Channel Proceeding developed a new subject of special inquiry concerning daytime secondary or skywave service and daytime skywave interference, Docket No. 8333: *Thirteenth Annual Report, F. C. C., Fiscal Year Ending June 30, 1947*, pp. 17-18: "SKYWAVE INTERFERENCE. A large percentage of daytime stations have been authorized to operate on clear channels. Heretofore the matter of daytime skywave interference has been of no particular significance in that there were so few daytime stations and they were generally so far removed from the dominant clear channel stations that no interference was involved. As a result of the large number of daytime stations now in operation, however, interference to the dominant stations during the so-called transition period from nighttime to daytime and from daytime to nighttime has become a problem necessitating consideration. For the purpose of obtaining data on the subject, the Commission in June 1947 conducted a hearing in the matter of promulgating rules, regulations and standards concerning daytime skywave transmissions of standard broadcast stations (Docket 8333) which may necessitate further amendments and changes in the engineering standards to take care of interference of this nature. A decision with respect to recommended amendments had not been made at the close of the fiscal year. Respondent was a party to said daytime skywave proceeding and the public record therein made prior to reargument of this case in the Court below established that operation of the Coastal Plains station will subject Station WJR's skywave and groundwave service to objectionable interference within its normally protected contour. See n. 17.

1946 and revised on June 21, 1946. In each of the other seven cases, the clear channel station licensee in its petition for rehearing claimed interference within the 100 uv/m contour, nevertheless, the Commission in each case denied a hearing. The Commission, in its brief before this Court now implies that if Respondent's petition had claimed interference within the 100 uv/m contour of its station, Respondent would have been accorded notice and hearing. The Commission's past actions in these companion cases are contrary to its present contentions in this case, i.e., that Respondent's standing as an aggrieved party is determined conclusively by the 100 uv/m contour. In the treatment of these cases before the Commission its action was predicated upon the interim procedure as set forth in the Public Notice of June 21, 1946 which specified a standard of geographical separation of "750 miles or less". This case and the other above-cited seven cases are similar in that the new daytime stations were separated 750 miles or less from the dominant clear channel stations which were duplicated. This case and the other seven cases are, therefore, similar with respect to the Commission's interim procedure, except as to the degree of service and interference stated in the pleadings.<sup>8</sup> The record discloses no findings as to any en-

<sup>8</sup>This difference is pointed up in the *concurring* opinion to the decision of the Court below in the 2nd above cited case, *WJR v. F. C. C.* (D. C. Cir. No. 9495), — F. 2d. —, as follows: PRETTYMAN, J., with whom EDGERTON, J., concurs, concurring: "I concur in this opinion and decision. I make this separate statement in order to emphasize that this case, with No. 9434, *L. B. Wilson, Inc. v. Federal Communications Comm'n.*, decided April 12, 1948, and No. 9464, *WJR, The Goodwill Station, Inc. v. Federal Communications Comm'n.*, decided this day, together present all phases of the problem upon which the court differs in opinion. In the present case, the petitioner alleged that the proposed new station would cause substantial interference 'well within its 100 uv/m contour'; the supporting engineer's affidavit asserted the same interference and, indeed, showed it at the 200 uv/m contour. The opposition to that petition asserted that the alleged interference would not be from groundwave, and that normal protection, under the Commission's Standards, is against groundwave only. Exam-

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1948.

\_\_\_\_\_  
No. 495.  
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FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

WJR, THE GOODWILL STATION, INC., *Respondent*,  
(COASTAL PLAINS BROADCASTING CO., INC., *Intervenor*).

\_\_\_\_\_  
On Writ of Certiorari to the United States Court of  
Appeals for the District of Columbia Circuit.

\_\_\_\_\_  
BRIEF FOR WJR, THE GOODWILL STATION, INC.

\_\_\_\_\_  
**OPINIONS BELOW.**

The Commission's order granting the application here at issue has not yet been reported (See n. 3). The Commission's decision and order on Respondent's Petition for Reconsideration has not yet been reported (R. 25-27). The opinion of the Court below and its judgment, both entered October 7, 1948, have not yet been reported (R. 38-67, 67-68).

## JURISDICTION.

The jurisdiction of this Court is invoked under Section 402(e) of the Communications Act of 1934, as amended, 47 U. S. C. 402(e), and under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. 347(a). Petition for writ of certiorari filed January 4, 1949, was granted by order of this Court entered February 28, 1949, transferring this case to summary docket (R. 71).

## QUESTION PRESENTED.

Whether, in a contested case involving a substantial issue before the Commission, it may treat the facts as if on demurrer and dispose of the case by an *ex parte* ruling on the pleadings, without any opportunity for a hearing by oral argument at some stage prior to appeal.<sup>1</sup>

## STATUTE AND REGULATIONS.

Relevant provisions of the Communications Act of 1934, as amended, (47 U. S. C. 301-609), hereinafter referred to as "Act", are set out in Appendix A to the Commission's Brief, pp. 48-53. Relevant sections of the Commission's Rules and Regulations, hereinafter referred to as "Rules", are set out in whole or in part in Appendix A to the Com-

<sup>1</sup> The Commission's statement of the question presented both in its Petition for Writ of Certiorari and as revised in its Brief, assumes "that no showing whatsoever has been made that the grant of the new application could operate as a modification of the objector's existing license." This assumption is unwarranted. The argument in the Commission's Brief states that the Commission assumed the truth of the facts as set forth in Respondent's petition before the Commission (p. 33). And Respondent's petition alleged that its present interference-free service over substantial areas in which WJR is the most listened-to station will be subjected to objectionable interference by operation of the Coastal Plains station. The Commission did not move to dismiss Respondent's appeal to the Court below. On the contrary, the Commission did contend and is now contending that Respondent has the right of review on appeal as to the questions of law ruled on *ex parte* by the Commission (R. 55-58, F. C. C. Brief p. 41).

mission's Brief, pp. 53-59, with the exception of Rule 1.893(b) and Rule 3.11, which are printed in n. 12 and n. 16. Provisions of the Commission's Standards of Good Engineering Practice (F.C.C. Brief, pp. 59-60), hereinafter referred to as "Standards", to the extent material, are reproduced in whole or in part in Appendix 1 to this brief.

### STATEMENT.

Respondent is the licensee of radio station WJR at Detroit, Michigan. For 20 years Respondent has been the licensee of station WJR. For 13 years Respondent has been licensed to operate as a Class I-A clear channel station, for which is authorized a minimum and maximum power of 50 kw. (Rules 3.22 and 3.25(a)). Its frequency is 760 kc. During nighttime hours there is no station, other than WJR, operating within the continental United States on 760 kc. During daytime hours (prior to this case) there was no station, other than WJR, operating within the continental United States on 760 kc.<sup>2</sup>

On August 22, 1946 the Commission issued a release announcing its order<sup>3</sup> granting, without notice or hearing, the application of Tarboro (now Coastal Plains) Broadcasting Company, Inc., to construct a new station at Tarboro, North Carolina (543 miles southeast of Detroit) to operate *daytime* with a power of 1000 watts on 760 kc, the frequency assigned to Respondent. This action was taken without notice to Respondent and without opportunity for hearing. The action was wholly *ex parte* and without any findings of fact.

On September 10, 1946 Respondent timely filed its Petition for Reconsideration and Hearing (R. 14-18) in ac-

<sup>2</sup> F. C. C. List of Radio Broadcast Stations, Jan. 1, 1948 (16748); Television Digest, Jan. 1, 1949, P. 56.

<sup>3</sup> The Commission's original order was publicly released Aug. 22, 1946, and is as follows: "Public Notice No. 97431. Report No. 877, Broadcast action. August 22, 1946. Tarboro Broadcasting Co., Inc., granted CP for a new station to operate on 760 kc, 1 kw, daytime only (B3-P-4891)."

cordance with Section 405 and Rules 1.390 and 1.893. Some three months later the Commission on December 17, 1946 released a Decision and Order denying Respondent's petition (R. 25-27). This action was taken without according Respondent any opportunity for hearing or for oral argument. In the meantime while Respondent's petition was still pending, the Commission on October 14, 1946 issued and delivered its construction permit (R. 21-23) to Coastal Plains. It was required under Paragraph 5. of the permit to commence construction by December 14, 1946 (R. 22).

From the order denying its petition, Respondent filed an appeal January 7, 1947 (R. 1-6) resulting in an opinion and judgment of the Court below reversing the Commission's order and decision.

The Commission's grant *ex parte* of the Coastal Plains application was made under a new interim policy which was announced during the pendency and prior to conclusion of a general rule-making proceeding. (R. 26, R. 39). *In re Clear Channel Broadcasting Service*, Docket No. 6741 (R. 6-8, 26; see R. 10-11).

*The Clear Channel Proceeding.* Some years prior to the war Respondent, and the licensees of other clear channel stations, applied for an increase in power from 50 kw to 500 kw and sought modification of Rules to remove the 50 kw power ceiling and otherwise to improve and extend service and minimize interference limitations. In the early months of the war the Commission dismissed such applications, including Respondent's, *without prejudice*. This problem was left dormant, under the war-time freeze, until February 20, 1945 when the Commission issued its notice of hearing in said Docket No. 6741 (R. 6-8) to which Respondent was a party as a member of the Clear Channel Broadcasting Service. The hearing was held in Docket No. 6741 beginning January 14, 1946 and ended October 31, 1947 within which period the Commission processed and granted the Coastal Plains application.



While this proceeding in said Docket No. 6741 was in progress and prior to its conclusion, the Commission on February 5, 1946 issued Public Notice 89273<sup>a</sup> (R. 9-10) announcing an interlocutory procedure as follows:

(a) Four categories of application for clear channel authorizations were dismissed, subject to reinstatement at the conclusion of the Clear Channel Proceeding, Docket No. 6741 (R. 13).

(b) As to applications requesting *daytime* operation (e.g. Coastal Plains) on a I-A clear channel (e.g. 760 kc licensed to Respondent) the Public Notice provided that each such application would be considered individually on its merits, and, if it presented any complication with the issues in the Clear Channel Proceeding, its grant, if made, would be conditional (R. 10).<sup>4</sup>

The above policy on applications for daytime stations was modified by a second interlocutory procedure set forth in Public Notice 95034 of June 21, 1946 (R. 10-11) as follows:

(a) Action on applications for daytime stations located *more than 750 miles* from the Class I-A clear

<sup>4</sup> The Commission's said Public Notice goes on to state: "the Commission has been concerned with the possibility that a grant of a large number of such applications would further complicate the problems that are involved in the Clear Channel Hearing. Further study of this matter has resulted in the conclusion that in many instances placing additional daytime only stations on the U. S. I-A channels may not unduly complicate the problems, and accordingly all such applications will be considered individually on their merits. When no conflict with a resolution of the general problems that are at issue in the Clear Channel Hearing can be foreseen, additional daytime assignments on U. S. I-A channels may be made before conclusion of the hearing. It is, however, possible to foresee that severe complications may arise by authorizing the operation of additional limited time stations, and such applications will be given careful consideration with a view to determining the possible complications, and in the event they can be foreseen, the applications may be conditionally granted for daytime operation only."

engineering basis for grants within and denials beyond a distance of 750 miles nor any correlation between a mileage separation of 750 miles or less and a 100 uv m contour.

*WJR Service and Interference.* Respondent's petition before the Commission alleged that operation of the Coastal Plains station would subject the present interference-free service of Station WJR to objectionable interference (R. 15). The affidavit accompanying Respondent's petition established that (R. 16-18):

(a) *Middle States Area.* Station WJR delivers a useable daytime signal over all or a portion of the states of Indiana, Ohio, Pennsylvania and New York, which would be destroyed by interference from the proposed Coastal Plains station.

(b) *Lower Michigan Area.* Station WJR delivers a useable daytime signal over lower Michigan which in all or a portion of 12 counties in the northern part would be destroyed by interference from the proposed Coastal Plains station. This area includes all of Leelanau, Charlevoix and Cheboygan counties in which there are no broadcast stations, all of Emmet county in which there is one local station (WMBN), and a part of eight other counties in only two of which are stations (WKLA, WTCM), both local.

(c) *Upper Michigan Area.* Station WJR delivers a useable daytime signal over all of the 14 counties of upper Michigan, which would be destroyed by interference from the Coastal Plains station. In seven of these counties there are no radio stations. (There is one local station in each of the other seven counties,

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ination of the Standards shows that the question thus presented was indeed substantial. There is a serious and debatable question whether the Standards, thus the licenses of all Class I clear channel stations, give protection against skywave in the daytime. Therefore, I agree that this appellant was entitled to a hearing before his petition was denied."

WJMS, WSUD, WHDF, WOMJ, WJPD, WMIQ and WDBO).

Over most of the Middle States area above where WJR's present interference-free service would be destroyed, it was conceded that a better signal is provided by other stations. But with respect to both the lower Michigan area and the upper Michigan area above, WJR provides "the best signal available" to most of this region. (The portion excluded would be the built-up city areas and that within the service of the ten local stations.) Also with regard to the lower and upper Michigan area described above, it is established that:

(a) This area is unusually free of atmospheric noise with the result that a very low order of signal will provide an acceptable service, (R. 17) and

(b) In this area WJR is in fact "the most listened to station" based upon the Commission's own Radio Survey compiled for it by the Bureau of Census (R. 17, 33).

The record in this case establishes that station WJR in fact delivers a groundwave service over the three above-described areas; which under Rule 3.11 (n. 16) constitute a portion of Respondent's "primary service area" or "intermittent service area" or both (Appendix I). (Subsequent proceedings established that WJR also provides a secondary service daytime over a more extensive area, n. 7). And the record in this case also establishes that the operation of the Coastal Plains station will cause interference which will destroy WJR's present interference-free service within such areas. Those facts raised an issue of importance clearly relevant to Rule 1.390(4), i. e., "A grant of the application is not in the public interest."

## ARGUMENT.

*Introduction.* This case as presented here by the Commission is without precedent. The Commission is contending both that Respondent is not a person entitled to hearing in a case before the Commission, and also that Respondent is a person entitled to judicial review of that case on appeal. This is something new to the field of administrative law, and turns upside down the doctrine that judicial review is subsequent to final administrative action. The rule contended for by the Commission would result in a person obtaining an initial hearing, not before the administrative tribunal invested with initial jurisdiction over the subject matter, but on appeal from an *ex parte* ruling.

This case is concerned with the procedures applicable to the disposition of a case on a question of law only, as applied to the fact of interference to the interference-free service of an existing station resulting from operation of a proposed new station granted by the Commission without a hearing. The question of law is: Whether the Commission's action in duplicating a new station on the frequency channel assigned to Respondent's station constituted, indirectly, a modification of Respondent's license under Section 312(b) of the Act within the rule of *FCC v. NBC*, 319 U. S. 239?

What procedures are involved in the disposition of such question of law?

If that question of law is to be answered in the affirmative or if there is a fact issue involved in such a determination, it is conceded that due procedure would require that Respondent be made a party to the case with the right of notice and hearing in the full sense.<sup>9</sup>

If this question is to be answered in the negative, what are the procedural requirements? The Court below holds

<sup>9</sup> "Accordingly, no question is presented here with respect to procedures that must be followed under the Due Process Clause with respect to the resolution of a question of fact." (F. C. C. Brief, p. 33).



that the Commission *may* treat the petition of the existing station licensee for rehearing as if on demurrer and dispose of the case ~~on the~~ questions of law raised on the face of the petition. ~~But~~ in such case, the Court below holds that ~~the~~ existing station licensee must be accorded the minimal right of hearing by oral argument on the question of law at issue as raised by its Petition for Rehearing.

The Commission contends that the right of such hearing is discretionary and that the Commission can dispose of the case on the pleadings by *ex parte* decision, but subject to review on appeal as to questions of law.<sup>10</sup>

The Commission states that in acting on Respondent's Petition for Reconsideration and Hearing it assumed the truth of the facts as set forth in the Petition.<sup>11</sup>

The Commission contends that it was not required to accord Respondent a hearing, by oral argument or otherwise, on the application of such facts to the Act or to the Rules and Regulations of the Commission, i.e., the procedural requirements in the disposition of a case involving only a question of law does not include the right of hearing by oral argument, since statutory provision is made for the disposition of questions of law including the right of oral argument on appeal.

From the foregoing we can set aside any question as to procedural requirements in a case involving an issue of fact or an issue of fact and of law. In such a case, the opinion of the Court below does not hold that an oral argument is a *sine qua non* of due process. For example, if

<sup>10</sup> "This availability of judicial review thus affords a safeguard, sufficient for constitutional purposes, against a possibly erroneous interpretation of the statute and the Rules and Regulations." (F. C. C. Brief p. 4).

<sup>11</sup> "After study of the pleadings the Commission, on December 17, 1946, adopted and issued its Decision and Order denying the Petition. This opinion was based on an assumption of the truth of the facts as alleged by the Petitioner with respect to both the pending Clear Channel Proceeding and the alleged interference which would be caused to its service by the operation of the Coastal Plains Station." (F. C. C. Brief p. 33).

the Commission in this case had challenged the facts set forth in Respondent's petition and ordered a hearing on the issues of fact before the Commission, or any delegated Division or Commissioner (Sec. 5), oral argument by Respondent obviously would be discretionary, including reconsideration on petition for rehearing.

The Opinion of the Court below holds that the Commission has the discretion of choosing whether to dispose of the case on an issue of fact, or on an issue of law. The latter procedure is similar to a preliminary hearing on a motion to dismiss as provided for in Rule 12(d) of the Rules of Civil Procedure. Under this procedure, a negative ruling on the question of law raised on the face of Respondent's petition would have disposed of the case finally before the Commission.

The character of "hearing" under review here, therefore, is that hearing appropriate to the disposition administratively of a case on a question of law. The hearing in such a case, with the facts being admitted, is an oral argument. Traditionally, the accepted procedure for the disposition of a case on a question of law only, is by oral argument.

In a case before an administrative tribunal involving a question of fact or a question of mixed fact and law, there is no question as to the right of hearing in the full sense, which may or may not include the right of oral argument as such at some stage in the proceeding. In a case involving a question of law only, the only hearing appropriate to its disposition is an oral argument. It is Respondent's contention, therefore, that if a person has the right to a full hearing on a question of fact, it must follow that a person has the right to a hearing by oral argument on a question of law. And in neither case can disposition be made by an *ex parte* finding or ruling.

It is appropriate at this point to set aside two other matters.

*Intervention.* Respondent's standing before the Commission in this case was that of a party respondent and not that of a party intervenor. Respondent's petition was not filed under Rule 1.388 entitled "Petitions to Intervene" but was filed under Section 405 of the Act and Rule 1.893(b) which provides that "The petition for rehearing may request (1) reconsideration \* \* \* in cases of applications granted without hearing under Title III of the Act \* \* \* 12

The statement in the Commission's Brief, p. 16, that "Leave to intervene was, in essence, what Respondent was asking of the Commission" is patently incorrect.

The minority opinion in the Court below takes off on this false bearing and never thereafter gets back on a true course.<sup>13</sup>

The majority opinion of the Court below does not hold that a permissive intervenor is entitled to oral argument on its petition to intervene. The statement of the Commission on this point beclouds the issue in this case and overlooks the distinction between a party respondent and a party intervenor (R. 54). Compare *FCC v. NBC, supra*, the *KOA Case* with *SEC v. U. S. Realty & Improvement Co.*, 310 U. S. 434. Although in the *KOA Case* the pleading before the Commission was in form an intervention, this

<sup>12</sup> *Rehearings.* 1.893 "Contents; relief requested.—(a) \* \* \* (b) The petition for rehearing may request (1) reconsideration, either in cases decided after hearing or in cases of applications granted without hearing under title III of the act; (2) reargument; (3) reopening of the proceeding; (4) amendment of any finding, or (5) other relief. Such petition shall be specific as to the form of relief sought and, subject to this requirement, may contain alternative requests."

<sup>13</sup> "But it was basically a Petition to Intervene as it asked that WJR be made a party to the Coastal Plains proceeding" (R. 59). The minority opinion is also in error in assuming that a person who petitions to intervene is not entitled to oral argument, whereas under the Commission's Rules, such a person is accorded right of oral argument in Motions Docket with a right of review before the Commission *en banc*. (Rule 1.741 and 1.745(b)).

Court, however, affirmed a reversal of the Commission's decision and held that KOA was entitled to be made a party under Section 312(b) of the Act. The opinion of this Court in that case states (246-347):

"Certainly one who is to be notified of a hearing and to have the right to show cause is not to be considered a stranger to the proceeding but is, by the very provisions of the statute, to be made a party. \* \* \* In view of the fact that Section 312(b) grants KOA the right to become a party to the proceeding, we think it plain that it is a party aggrieved, or a party whose interests will be adversely affected by the granting of WHDH's application \* \* \*".

Accordingly, if this Respondent had any standing before the Commission in this case, it was that of a party respondent and not that of an intervenor.

b. *Contour Protection.* A fundamental misconception which is the basis of the minority opinion in the Court below is that Respondent's station, as a matter of law, is entitled to protection to its 100 uv/m contour, no more and no less (R. 62), and that the right of Respondent to a hearing coincides, as a matter of law, with such contour. Respondent's license contains no such limitation (R. 12-13, 23-25). Neither does such limitation appear anywhere in the Act or in the Commission's Rules (Commission's Brief pp. 48-58). There is no basis for the suggestion in the minority opinion that Respondent might have but did not obtain a special provision in its license granting additional protection outside and beyond such contour or that there was any necessity under the Commission's Rules or licensing procedures for such a provision. It is sufficient here merely to point out that the 100 uv/m contour did not delineate the interest or lack of interest of a party in the other seven companion daytime case, *supra*, in each of which interference within such contour was established but the right of the existing station licensee to a hearing, nevertheless, was denied.



There remain for consideration two points: The Due Process question, points I and II in the Commission's Brief, and Respondent's standing before the Commission as an aggrieved person or one whose interests are adversely affected under the Act and the Commission's Rules.

# I.

**In a Case Before the Commission a Party in Interest is Entitled to a Hearing, Under the Act and the Due Process Clause; Such Hearing to be Limited to Oral Argument if the Commission Chooses to Dispose of the Case on a Question of Law.**

1. The opinion of the Court below, fairly interpreted, holds that in such a case the petition of a person requesting reconsideration or (re)hearing of an action granting a new station without a hearing, may be disposed of as follows:

(a) If the party-petitioner clearly fails to establish some special or peculiar interest which may be directly and materially affected or does not have something more than a common concern for obedience to the law, such person may be considered to have no standing as a party in interest to such case and his petition may be *dismissed* without hearing by argument or otherwise. *L. Singer & Sons v. U. P. R. Co.*, 311 U. S. 295. For example, the Court below would affirm such action by the Commission in this case if Respondent's interest were limited to that of an applicant in the future for an increase in power if allowed by the proposed rules pending before the Commission (R. 41).

(b) If the party-petitioner establishes itself as an interested person to such case and the allegations of its petition raise an issue of fact, the disposition of which is dependent upon findings of fact by the Commission, then such person is entitled to be made a

party respondent in such case with a right of hearing in the full sense, at some stage prior to final action. Such hearing may or may not include oral argument depending upon the applicable statute and regulations, or depending on whether the case is tried by one person and decided by another person or body. *F. C. C. v. N. B. C. supra*, *Ashbacker Radio Corp. v. F. C. C.*, 326 U. S. 339, *Morgan v. U. S.*, 298 U. S. 468, *U. S. v. Wood*, 61 F. Supp. 175, 179, *Lacomastic Corp. v. Parker*, 54 F. Supp. 138, 141.

(c) If the party-petitioner establishes itself as an interested person to such case and the allegations of fact in its petition are accepted as true, the case, at the election of the Commission, may be disposed of as if on demurrer, but with a right of hearing accorded the petitioner. It is sufficient in such case, with the facts being admitted, to dispose of it on the questions of law with the hearing limited to an oral argument. *Londoner v. Denver*, 210 U. S. 373, *L. B. Wilson v. F. C. C.*, 170 F. 2d 793, *Walker v. Popenoe*, 149 F. 2d 511, *Security T. & S. Co. v. Lexington*, 203 U. S. 323, *Bourjois v. Chapman*, 301 U. S. 183.

The foregoing covers the procedural requirements appropriate to three categories of cases under the rule of the Court's decision below, which neither adds to nor subtracts from the present field of administrative law. The opinion of the Court below, of necessity, ventures one additional category, or a subclassification of category (c) above. All factors are the same, i.e., a case to be disposed of on a question of law only, but with a close question as to the standing of the petitioning party as a person aggrieved or whose interests are affected by the action taken or proposed. The Court below resolves any reasonable doubt as to the standing of a petitioning party as a person in interest in favor of the petitioner, by requiring as a minimal right that such person be granted leave to present orally its claim as an ag-

grieved party. That is the essence of the decision under review.

2. The opinion of the Court below, fairly interpreted, does not hold, as the Commission's Brief contends or implies,—(a) that a stranger to a case is entitled to a hearing or to be heard on its rights to a hearing; or (b) that an intervenor is entitled to be heard on its standing to intervene; or (c) that an oral argument is a matter of right at some stage in a full and fair hearing in a case involving an issue of fact or a mixed question of fact and law; or (d) that, in any such case where a full hearing is required, a party thereto has a right to a preliminary hearing by oral argument on any question of law raised in such case. (This situation arises only if the Commission itself chooses to treat the petition as if on demurrer). The foregoing is clear from the statement in the opinion of the Court below as follows (R. 54-55):

“WJR as an outstanding licensee is not a mere permissive intervenor or; as the minority puts it, an ‘outsider’. Under Section 312(b) of the Communications Act and the ruling of the Supreme Court in the KOA case, if the license of WJR as an outstanding station will suffer indirect modification by the operation of the applicant station, Coastal Plains, WJR is entitled to a hearing on the question whether or not such modification is required by the public interest; and under the ruling of this court in the Wilson case it is entitled first to a hearing on the issue modification *vel non* itself and therefore, as above explained, at the threshold to a hearing on the question raised, as if on demurrer, whether or not the allegations of its petition for reconsideration show that there will be an indirect modification of its license by the operation of Coastal Plains.”

3. Turning now to Point I of the Commission's Brief, the above analysis shows that its contentions therein are far too sweeping and academic and go way beyond the record in this case or any reasonable interpretation of the opinion here under review.

The Commission is contending for a double standard of due process. No question is raised as to the standard of due process applicable in judicial proceedings. But no clear statement is made as to what standard of due process should be applicable in administrative proceedings. Short of contending that a hearing is discretionary and that respondent was fairly dealt with in being permitted to file its petition, the Commission leaves to uncertain speculation what lesser standard of due process is applicable to administrative proceedings.

The contention that in administrative proceedings due process must not be equated to judicial process (P. 18), is a straw dummy argument. There are, of course, many recognized differences, e.g., that a hearing may succeed rather than precede an administrative action, *U. S. v. Wood, supra*, *Inland Empire District Council v. Millis*, 325 U. S. 697, *Phillips v. Commissioner*, 283 U. S. 589, or that the trial and decision of a case may be by different persons, *Lacomastic Corp. v. Parker, supra*, *Morgan v. U. S., supra*. The flexibility or rigidity of due process procedural requirements is not an issue. In this case there is a total denial of due process at the outset. The degree of fairness in a hearing granted is likewise not an issue. In this case there was no hearing of any kind, fair or unfair, at any stage.

The opinion of the Court below did not decide whether Respondent is or is not a party in interest to this case before the Commission. It held rather that this question must be decided initially by the Commission. Without a decision on this question by the Commission and by the Court below on appeal, it is questioned that this Court should now make that decision initially.

The issue of due process, therefore, is conditional either to a decision that Respondent is a party in interest in this case, or that Respondent is entitled to be heard as to its claim that, as a matter of law, it is an aggrieved person or one whose interests are adversely affected by the Commission's action.



## II.

**Respondent's Petition Before the Commission Makes Out a Prima Facie Case That It is a Person Aggrieved or Whose Interests Are Adversely Affected by the Commission's Action.**

If the allegations of Respondent's petition are clearly frivolous or a sham, the petition should have been dismissed; if not, Respondent should have been heard.

That Respondent has a standing before the Commission as an interested party in this case is in effect admitted both by the Commission's action in not moving to dismiss the appeal, and *a fortiori* by its contention here and in the Court below that Respondent is a person entitled to the right of an appeal under Section 402(b) of the Act to review the Commission's *ex parte* action (n. 10).

1. Turning to the record in this case before the Commission, Respondent's standing as a person in interest, based on its status as the licensee of an existing station, is manifest from a consideration of any one or a combination of the following circumstances:

(a) Until the Commission's action in this case Respondent's station was the only one in the continental United States licensed to operate daytime or nighttime on 760 kc (n. 2). The Commission's grant in this case was the first instance of any duplication daytime of Respondent's clear channel assignment. Respondent's assignment was, therefore, one of only three unduplicated frequencies, a circumstance most favorable technically to the existence of its extensive present interference-free coverage and to an increase in service in the event of an authorization for use of higher power, which was the principal issue under consideration in the then pending Clear Channel Proceeding, Docket No. 6741.

(b) The facts alleged and here admitted establish that Respondent's station in fact furnishes a usable

and satisfactory radio broadcasting service over the above-described Middle States Area, over all or a portion of 12 counties in the Lower Michigan Area, and over all of the 14 counties in Upper Michigan; that over most of the Lower and Upper Michigan Areas, Respondent's station "provides the best signal available"; and that in such areas Respondent's station "is the most listened to station" according to an official survey of the Bureau of the Census.

(c) Similarly, the facts alleged and admitted establish that all of the above-described service, which is presently free from interference, would be destroyed over all three areas by co-channel interference from operation of the Coastal Plains Station granted by the Commission in this case.

(d) The agreed facts above stated, paragraphs (b) and (c), are fully sufficient to establish that the Commission's action constituted a modification, indirectly, of Respondent's license within the rule of *F.C.C. v. N.B.C., supra*, and that Respondent is a person aggrieved and adversely affected by such action. Compare the *KOA Case*; *Sanders Bros. Radio Station v. F.C.C.*, 309 U. S. 470, and *Ashbacker Radio Corp. v. F. C. C.*, 326 U. S. 339.

2. The above considerations fully qualify Respondent's standing before the Commission as a party in interest and one entitled to a hearing, or at least to be heard, as to its claims as an aggrieved person. However, the agreed facts raised other issues, as follows:

(a) Under the Act's legislative standard of public interest, convenience or necessity, Sec. 319(a); Respondent's petition raised a question of fact as to the comparative public interest between continuation of Respondent's present interference-free service in the Upper and Lower Michigan Areas as against estab-

ishing a new service in the vicinity of Tarboro, North Carolina, the resolution of which question is dependent upon findings of fact in a hearing (Rule 1.390(4)).

(b) That the Public Notice of June 21, 1946, pursuant to which the instant action was taken, is not a valid statutory rule or regulation either under the Act or the Administrative Procedure Act; and that the 750-mile separation provision is arbitrary and capricious and not supported by any finding and wholly lacking in any technical justification; or in any event, the Commission did not comply with the express terms of its public announcement in that the Coastal Plains application was not "conditionally granted" subject to a final determination in the Clear Channel Hearing.<sup>14</sup> The Coastal Plains permit contains no such condition (R: 21-23).<sup>15</sup>

3. The Commission's Brief revives consideration of the ruling against Respondent in point I of the opinion below (R. 41). In this matter the record shows that Respondent was one of the moving parties to amend the 50 kw power limitation in Rule 3.25(a). A determination of the Clear Channel Proceeding on this issue might have permitted or even required Respondent to increase its power to 500 or 750 kw.

<sup>14</sup> The Commission's Memorandum Opinion on the Clear Channel Group's petition states: "Any grants that are made to daytime stations are subject to whatever changes in the rules may be made as a result of the clear channel hearing." (R. 33).

<sup>15</sup> A condition for the purpose of protecting the Commission and interested parties pending final action in the pending rule-making proceeding, Docket 6741, which has been employed in other grants, would provide: "The Commission reserves the right during said license period, of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period." (R. 17, 33.)

In such event the existence of the Coastal Plains assignment would present a serious obstacle requiring possibly a modification of its license. Therefore, Respondent, as a party in interest to the Clear Channel Proceeding, and pending its conclusion, was also interested in maintaining the status quo as to its channel assignment or at least of requiring that any interim duplication of its channel be conditional to the outcome of the Clear Channel Proceeding. As to this matter, it is Respondent's contention that it is a party in interest to the Commission's action in this case by reason of its status in the Clear Channel Proceeding, as associated with the provision for grants on condition only in said Public Notice, within the rule of *Western Pacific California R. Co. v. Southern Pacific Co.*, 284 U. S. 47. In this case *Western*, based upon its pending application before the Interstate Commerce Commission for a certificate to extend its lines, was held to be a party in interest for the purpose of maintaining a suit to enjoin *Southern Pacific* from constructing a competing line. Similarly, Respondent, as a moving party in the proceeding to increase its power authorization, subject to Rule amendment, was in fact if not in law adversely affected by the Commission's action in this case.

4. The foregoing considerations establish Respondent's standing before the Commission as a party in interest to the action in this case, and taken collectively their cumulative effect leaves no doubt that the Commission's action affects adversely this Respondent. The only color of any contention to the contrary is the Commission's point, a technical one, that Respondent is barred from any interest at or beyond the 100 uv/m contour. This is the sole basis on which the Commission acquiesces in the lower Court's decision in *L. B. Wilson v. F. C. C.*, *supra*, and *WJR v. F. C. C.*, (No. 9495) . . . F. 2d . . . , but petitioned for review of the decision in this case.

The resulting issue stated most favorably to the Commission is: Whether the 100 uv/m contour is a limitation to Respondent's license, as a matter of law. It is Respon-



dent's contention that this question is not conclusive of the interests of a licensee and that even if answered in the affirmative, this question is subordinate to the overriding considerations set forth in paragraphs 1, 2 and 3 above. It should be a sufficient answer to this question merely to point out again that the Commission's actions in the other seven skywave cases in denying hearings where interference was established within such contour, do not indicate the existence of any rule or practice of measuring the interest of a person by the 100 uv/m contour.

However, assuming arguendo the contrary, the following considerations show the lack of any basis for that contention of the Commission in this case.

(a) The statutory standard is "public convenience, interest, or necessity" and the terms "contours" or "millivolts" are not found anywhere in the Act. The controlling circumstance under the Act is public service. The admitted fact in this case is that Respondent does render a public service in the areas subject to interference conflict in this case.

(b) Respondent's license contains no contour or uv/m limitation (R. 23-25):

(c) The Commission's Rules and Regulations do not contain the term "100 uv/m contour" (F.C.C. Brief pp. 53-58).

The Commission's Brief, page 39, states that "If Respondent had been afforded oral argument, the only significant contentions it could have made were \* \* \* that the Rules and Standards do not mean what they so obviously say".

The only basis for this statement is the 100 uv/m contour point. One phrase in one paragraph of the Standards states "during daytime the Class I station is protected to the 100-uv/m groundwave contour". If that were all, there might be some basis for the Commission's statement, but let us examine other provisions of the Rules and Standards

on this subject and see if they are so obvious or if they mean what they say.

Rule 3.11 defines three classes of service areas as follows:<sup>16</sup>

(a) *Primary Service Area.* This means "the area in which the groundwave is not subject to objectionable interference or objectionable fading". There is no question but what Respondent's station is entitled to be protected from interference to its primary service area. The general definition of this term as appearing in Rule 3.11 is further amplified in a provision of the Commission's Standards with respect to rural areas, as follows (Appendix I):

Rural—all areas during winter or northern

areas during summer . . . . . 0.1. to 0.5 mv/m

Rural—southern areas during summer . 0.25 to 1.0 mv/m

From the foregoing table it is apparent that the interference area in question in this case comprising the 24 counties in Upper and Lower Michigan constitutes a northern rural area where a groundwave signal with a field intensity of 0.1 mv/m or 100 uv/m constitutes primary service both during summer and winter.

(b) *Secondary Service Area.* This means "the area served by the skywave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity". This class of service is that provided by skywave and until recently has been associated with night-

<sup>16</sup>Rules Governing Standard Broadcast Stations—3.11 "Service areas.—(a) The term 'primary service area' of a broadcast station means the area in which the groundwave is not subject to objectionable interference or objectionable fading. (b) The term 'secondary service area' of a broadcast station means the area served by the skywave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity. (c) The term 'intermittent service area' of a broadcast station means the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading."

time service only. The Commission's Clear Channel Proceeding, commenced in April, 1945, brought to the attention of the Commission in 1947 that clear-channel stations render a secondary service by skywave during daytime hours. Respondent's petition in 1946 forecast the existence of such daytime skywave service by the statement that there will be some skywave present in the WJR signal and therefore, during the hours from sunrise to 10 A.M. and from 2 P.M. to sunset, interference will exist closer to WJR. This matter was made the subject of a special inquiry in Docket No. 8333 referred to as the *Daytime Skywave Proceeding*, which was subordinate to the Clear Channel Proceeding and subsequently consolidated therein.<sup>17</sup> The evidence in

<sup>17</sup> The Commission's Notice of Hearing in Docket No. 8333 dated May 9, 1947, states as follows: 1. Pike & Fischer, *Radio Regulations*, p. 53:907: "1. Notice is hereby given of proposed rule making in the above-entitled matter. 2. Under the Commission's rules and regulations and Standards of Good Engineering Practice, standard broadcast stations are not protected against daytime skywave transmission nor is there any method prescribed for determining the existence or extent of such transmission. 3. Affidavits have been filed with the Commission alleging that serious interference is resulting to the daytime service area of stations operating on clear channels as a result of skywave transmissions from Class II stations operating daytime on such frequencies which the Commission has authorized. 4. There are many applications still pending which request authority to operate daytime on clear channels. Appeals have been taken to the United States Court of Appeals for the District of Columbia from some orders of the Commission granting such applications. In one such case an order has been issued by that Court staying the effectiveness of a construction permit issued by the Commission. 5. In view of the foregoing a hearing in the above-entitled matter will be held before the Commission en banc, or such members as may be present, beginning at 10:00 a.m., June 2, 1947, to receive evidence concerning the existence and extent of daytime skywave transmissions of Standard Broadcast Stations and to promulgate whatever rules and regulations may be necessary. 6. The Clear Channel Broadcasting Service, which filed a petition on February 27, 1947, with respect to the subject matter of this proceeding, is hereby made a party to the proceeding. Any other interested person may appear and participate in the hearing by filing a written appearance in duplicate on or before May 26, 1947. 7. Until the hearing is concluded and a decision is announced, the Commission will defer action on all pending applications which

Docket No. 8333, both by government and industry experts, established the existence of such daytime skywave service and there was no substantial disagreement between government and industry engineers on this point. In that proceeding it was made a matter of public record before the Commission, prior to reargument of this case in the Court below, that the Coastal Plains station would cause interference to Respondent's station well within its 100 uv/m contour, both groundwave and skywave, and with even greater interference to its daytime skywave service. These facts came to light subsequent to Respondent's original petition before the Commission in this case and, therefore, although a matter of public record before the Commission, are not physically a part of this record. The Commission's Standards provide as to this class of service that Respondent's station being a Class I station is "assigned on the basis of rendering secondary service". This provision is limited to a skywave signal but is not limited to nighttime service.

(c) *Intermittent Service Area*. This means "the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading". As amplified in the Standards, this class of service is that rendered by a groundwave signal, and begins at the outer boundary of the primary service area and extends outward to where the signal has no service value. As applied to this case, that provision means that the intermittent service area of Respondent's station begins at its 100 uv/m contour and extends outward until the signal has no service value. The record clearly shows in this case that the signal of Respondent's station in question has a definite service value. The Standards go on to state that in certain areas (of which Michigan is one) a signal of only a few microvolts will have a service value. This pro-

seek daytime or limited time operation on United States *F-A* or *F-B* frequencies. The Commission will announce its decision as soon as possible after the proceeding is closed so that the processing of such applications may be resumed at the earliest possible date. The hearing in Docket No. 8333 was held June 4-6, 1947.



vision also states without qualification that Respondent's station, being a Class I station, is "assigned for protection from interference from other stations into the intermittent service area". The allegation set forth in Respondent's petition fully established the service value of the signal delivered throughout the interference area of Upper and Lower Michigan in question which would be destroyed by the Coastal Plains station.

The Commission's Standards also provide that Respondent's station, being a Class I station, is intended to "render service to all three service areas; namely, primary service area, secondary service area and intermittent service area".

We now repeat the question originally put by the Commission's Brief: Do the Rules and Standard of the Commission really mean what they so obviously say?

The Commission's contention that the 100 uv/m contour is, as a matter of law, a limitation to Respondent's license is completely destroyed by another public document of the Commission. The Commission's standard form of Application for New Standard Broadcast Station Construction Permit states: *"The use of the terms 'normally protected contours' and 'objectionable interference' shall not be taken as implying any right to protection of such contours or from such interference"* (R. 14.) If this statement means what it says, it must follow that, as a matter of law, if the 100 uv/m contour does not confer a right, it cannot defeat a remedy.

5. Although the Commission's Standards, the only place containing the term "100 uv/m groundwave contour", do not support the Commission's contentions on this point but are decidedly more favorable to Respondent's position as shown above, these Standards do not and are not intended to have the status of statutory regulations. The Standards are set forth in a document of 48 pages and 21 graphs dealing with some 25 subjects such as engineering standards of allocation, field intensity measurements, directional an-

antenna systems, location of transmitters, antenna heights, lamps and paints, direct measurement of power, vacuum tubes, plate efficiency, power tolerance, construction design, indicating instruments, automatic frequency control, frequency monitors, modulation monitors, low temperature crystals, money requirements, common antennae, auxiliary transmitters, equipment, application forms and field offices. In short, the Standards serve as an engineering guide for the preparation of applications, engineering exhibits and testimony, and for the construction, equipping and operation of stations, but they do not, as a matter of law, govern conduct or rights of licensees.<sup>18</sup>

6. The several matters set forth in Paragraphs 4 and 5 above clearly establish that the Commission's Standards, even if considered as statutory rules, do not limit the extent of interference protection to Respondent's station in terms of a 100 uv/m contour. Respondent's petition, pre-

<sup>18</sup> The non-statutory character of the Commission's Standards, as contrasted with its Rules and Regulations, is established by the Commission's statement thereon at the time of their original issue in 1939. *Fifth Annual Report, F. C. C. Fiscal Year ending June 30, 1939*, p. 41: "Scope of Standards of Good Engineering Practice. . . . Necessity for the standards arises by reason of the fact that all of the technical principles of allocation, and use of facilities cannot be incorporated in the rules and regulations, because of the rapid changes taking place. The rules and regulations cover only the basic and more general principles. To obtain uniformity in presenting technical data on all applications concerning standard broadcast stations, it is necessary that the Commission enunciate the manner and method in which the data shall be presented. This provides a distinct advantage in the administration of the technical regulations, greatly improves the uniformity of action on formal applications, and serves as a guide to engineers. Many of the standards set out certain methods of compiling and submitting data. The provisions of the Standards may be divided into three classes, as follows: (1) Those provisions which are incorporated by reference in the rules and regulations and which have substantially the same meaning and effect as the rules and regulations. (2) Those provisions which go beyond the rules and regulations so as to disclose policies and principles of allocation and regulation. (3) Those provisions which are included primarily as a guide to applicants and licensees."

sented issues of substance and importance. As to those issues, the Commission's Rules and Standards are inconclusive, ambiguous and contradictory. Under the statutory standard of public interest, Respondent's claim and the Commission's admission of the destruction of Station WJR's service over an area comprising some 24 counties, many of which had no local service, and where the F.C.C. Radio Survey establishes that 83% of some 74,240 households reported reception of such service without trouble (R. 33), and that "WJR is the most listened-to station" (R. 17), is neither *frivolous* nor a *sham*.

The Commission's characterization of Respondent's petition as *frivolous* (F.C.C. Brief, pp. 46, 45, 17) is both unfortunate and in disregard of the record. Were the issues presented in the other seven companion daytime clear channel duplication cases, *supra*, insubstantial and frivolous? Are the Commission's Public Notices as to interim-procedure in such cases (R. 9-11) insubstantial and frivolous? Was the Commission's inquiry into this matter in Docket No. 6741 (R. 6-8, 27-33; n. 6, and n. 7) insubstantial and frivolous? If Respondent's petition was frivolous why was it not dismissed forthwith instead of denied three months and one week after filing? If the subject matter of Respondent's petition was frivolous in December, 1946, why did the Commission make that matter the subject of a special hearing in May, 1947, (n. 17) and issue a stop order on the grant of any applications in similar cases? If the issues presented in this case are insubstantial and frivolous, should the Commission contend, as it does, that Respondent has the right of appeal in this case (F.C.C. Brief p. 41, R. 55) with the right of a hearing by oral argument initially before the Court below?

The Commission's contention on this point is completely destroyed by the cases which it cites (F.C.C. Brief p. 17; n. 8). For example, in *Commander Milling Co. v. Westridge*, 40 F. 2d 469, the plaintiff's motion to strike special defenses as frivolous was *not* disposed of "summarily" but was subject to consideration both at the beginning and at the con-

clusion of the trial before the District Court and the District Court's grant of the motion was reversed on appeal. The Court's opinion considers the meaning of the terms "sham" and "frivolous" at length and cites with approval one case holding (472):

"A sham pleading is one that is false; and to justify the court in striking out a pleading as sham its falsity must be clear and indisputable. Every reasonable doubt must be resolved in favor of the pleading. Where there is a dispute in the affidavits as to the facts upon which the answer must rest, it cannot be said that its falsity is clear and indisputable. Upon such motion the duty of the court is to determine whether there is an issue to try, not to try the issue."

In *Hespe v. Corning Glass Works*, 9 F. Supp. 725, 728, the Court considers the meaning of the term "frivolous" as follows:

"Matter contained in an answer is 'frivolous' when it conclusively and without the necessity of argument appears bad on its face (*Young v. Kent*, 46 N.Y. 672; *Cook v. Warren*, 88 N.Y. 37), or is obviously imposed in bad faith (*Curran v. Arps*, 141 App. Div. 659, 662, 125 N.Y.S. 993), and affidavits may not be received on a motion to strike it out (*Dancel v. Goodyear Shoe Mach. Co.*, 67 App. Div. 498, 73 N.Y.S. 875). If it requires careful examination and argument to answer the matter set up in the defense, it cannot be stricken out as 'frivolous'. See cases supra; *Dominion Nat. Bank of Bristol v. Olympia Cotton Mills et al.* (C.C.) 128 F. 181.

"In regard to the fourth separate defense, it is doubtful whether the defendant can avail itself of the matters set up. Notwithstanding this, it requires argument and considerable examination of the contract and a sufficiently substantial investigation of all the facts and circumstances to decide that question, and for that reason it is deemed best not to strike the defense out at this time, but to leave the matter open for the trial and without prejudice to a motion to strike out at the opening of the trial."



The above-cited cases establish that in a case involving a close question as to whether or not allegations are frivolous, every reasonable doubt must be resolved in favor of the pleading. If an argument is required to show that the pleading is bad, it is not frivolous. *Commander Milling Co. v. Westinghouse*, *supra*; *Samuel Galding v. United Artists Corp.*, 35 F. Supp. 633, 637; *U. S. v. Aho*, 51 F. Supp. 137, 139.

The Commission's Brief on this question points up a rule for determining whether, in such a case, a petition should be dismissed or should be heard. If the allegations of the petition are clearly frivolous or a sham, dismissal is a proper action. If otherwise, the petition should be heard. Or, in case of a reasonable doubt, that should be resolved in favor of a hearing at least by oral argument. In any event this question should be disposed of initially by the Commission and prior to appeal. Such a rule is entirely consistent with the opinion of the Court below.

### CONCLUSION.

For the reasons above set forth, it is respectfully submitted that the judgment of the Court below should be affirmed.

This brief does not venture into a discussion on the merits of the correspondence between the Office of the Solicitor General and the thirteen Federal Departments and Independent Agencies set out in Appendix B of the Commission's Brief.<sup>19</sup> Although there is much in this file of correspondence favorable to the opinion of the Court below,

<sup>19</sup> Appendix B contains no explanation of the failure to send letters to or, if sent, the failure to print replies from the following departments or agencies: Department of the Treasury, Bureau of Internal Revenue, Bureau of Customs; Department of the Army, *See Clarksburg-Columbus Short Route Bridge Co. v. Woodring*, 89 F. 2d 788, 790; Department of Justice, Immigration and Naturalization Service, Board of Immigration Appeals; Civil Aeronautics Board; Civil Service Commission; Federal Reserve System; Housing and Home Finance Agency; Tariff Commission; and Veterans Administration.

which is surprising in view of the partisan character of the Solicitor General's letter, such file of correspondence, whether favorable or unfavorable is neither proper nor relevant to this record or to the issues in this case.

The letter from the Office of the Solicitor General unfortunately is both leading and misleading and the questions put are, to say the least, "loaded". The letter violates all precepts of an impartial inquiry of truth. Respondent, therefore, has sent a letter addressed to each of the Departments and Agencies listed in said Appendix B, enclosing a copy of this brief, and requesting a reconsideration of this matter and a further reply to the Office of the Solicitor General for his submission to the Clerk of this Court. A copy of Respondent's letter is set out in Appendix II of this Brief.

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PERCY H. RUSSELL, JR.,

*Counsel for Respondent.*

## APPENDIX I.

Standards of Good Engineering Practice Concerning  
Standard Broadcast Stations (550-1600 KC).

(4. F. R. 2862)

October 30, 1947

## 1. Engineering Standards of Allocation

When it is shown that primary service is rendered by any of the above classes of stations, beyond the normally protected contour, and when primary service to approximately 90 percent of the population (population served with adequate signal) of the area between the normally protected contour and the contour to which such station actually serves, is not supplied by any other station or stations carrying the same general program service, the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration.

The several classes of broadcast stations have in general three service areas (Rule 3.14); namely, primary, secondary, and intermittent service areas. **Class I stations render service to all three service areas.** (See n. 16.)

The signals necessary to render the different types of service are listed below.

TABLE I.—Primary service

Area:	Field intensity groundwave
City business or factory areas . . . . .	10 to 50 mv/m
City residential areas . . . . .	2 to 10 mv/m
Rural—all areas during winter or northern areas during summer . . . . .	0.1 to 0.5 mv/m
Rural—southern areas during summer . . . . .	0.25 to 1.0 mv/m

### SECONDARY SERVICE

Secondary service is delivered in the areas where the skywave for 50 percent or more of the time has a field intensity of 500 uv m or greater. It is not considered that satisfactory secondary service can be rendered to cities unless the skywave approaches in value the groundwave required for primary service. The secondary service is necessarily subject to some interference and extensive fading whereas the primary service area of a station is subject to no objectionable interference or fading. **Class I stations only are assigned on the basis of rendering secondary service.**

### INTERMITTENT SERVICE

The intermittent service is rendered by the groundwave and begins at the outer boundary of the primary service area and extends to the value of signal where it may be considered as having no further service value. This may be down to only a few microvolts in certain areas and up to several millivolts in other areas of high noise level, interference from other stations, or objectionable fading at night. The intermittent service area may vary widely from day to night and generally varies from time to time as the name implies. **Only Class I stations are assigned for protection from interference from other stations into the intermittent service area.**

(Bold type added.)



## APPENDIX II

KIRKLAND, FLEMING, GREENS, MARTIN & ELLIS  
National Press Building  
Washington 4, D.C.

To: U. S. Department of Agriculture, Office of the Solicitor  
U. S. Department of the Interior, Office of the Solicitor  
U. S. Department of Labor, Office of the Solicitor  
Post Office Department, Office of the Solicitor  
Department of Commerce, Office of the Solicitor  
Interstate Commerce Commission, Office of the Chief Counsel  
National Labor Relations Board, General Counsel  
U. S. Maritime Commission, Office of the Solicitor  
Federal Power Commission, General Counsel  
Railroad Retirement Board, General Counsel  
U. S. Securities & Exchange Commission, General Counsel  
Federal Security Agency, General Counsel  
Federal Trade Commission, General Counsel

Gentlemen:

Re: *WJR, The Goodwill Station Inc. v. Federal Communications Commission* (U. S. Supreme Court No. 495)

Reference is made to the letter of the Solicitor General, Department of Justice, dated February 3, 1949, and to your reply thereto regarding the above-cited case. You will recall that the Solicitor General requested a statement of your comments for use in preparation of the Government's brief in the above case before the U. S. Supreme Court. Your reply together with replies to an identical letter from twelve other departments and agencies have been printed as Appendix B to the Government's brief filed 12 April 1949 with the Office of the Clerk of the U. S. Supreme Court.

There is enclosed for your information and file a copy of the reply brief on behalf of WJR, The Goodwill Station, Inc., Respondent. Your attention is invited to Respondent's

contention in the conclusion part of its brief that the above-described letter of the Solicitor General is both leading and misleading. The several replies considered collectively support Respondent's contention that the statements made in the letter of the Solicitor General and the questions put do not fairly and correctly interpret the opinion of Harold M. Stephens, Chief Judge, U. S. Court of Appeals, District of Columbia Circuit. Several of the replies, therefore, understandably express concern as to various matters not encompassed in the opinion under consideration. For example:

(a) The opinion does not hold that a stranger to a case or a petition which is frivolous or a sham is entitled to be heard.

(b) The opinion does not hold that a person seeking to intervene in a case is entitled to be heard upon his petition to intervene.

(c) The opinion does not hold that an oral argument is a matter of right at some stage in a hearing on a case involving issues of fact or mixed questions of fact and law.

(d) The opinion does not hold that in a case involving a hearing a party thereto has any right to a preliminary hearing by oral argument on the questions of law raised in such case.

We are satisfied that your further examination of the Court's opinion with the aid of this brief will convince you as to the correctness of the foregoing statements. Respondent's understanding of the Court's opinion is that in a contested case before the Commission under the Communications Act of 1934, as amended, the Commission may grant a full hearing on the facts in the usual sense or, at its election, it may treat the allegations of a petition by an interested party as if on demurrer and dispose of the case on the questions of law presented, by according the petitioner a hearing by oral argument at some stage prior to appeal.

The right of oral argument, as such, is clearly not involved. The right to a hearing is the cornerstone of the Court's opinion and the type of hearing on a case involving questions of law only is, of course, an oral argument.

We are certain you will agree upon reading the enclosed brief that Respondent's stake in this case before the Commission was substantial and that its petition raised important and substantial questions which were clearly not frivolous. The Commission's order under review granted a new radio station at Tarboro, North Carolina, to operate on the same frequency channel as that assigned to Respondent's clear channel station at Detroit, Michigan. Prior to this action, there was no other station operating in the United States on the frequency licensed to Respondent. Operation of the new station would result in interference to Respondent's station and destroy its existing interference-free service over an area covered by some 24 counties in Upper and Lower Michigan. Over most of this area, Respondent's station delivers the best signal available and is the most listened-to station as established by the Commission's own official survey. There is no dispute as to the fact that the Commission's action would destroy this service being rendered by Respondent's station. Whether Respondent's station as a matter of law is entitled to protection as to such service, is a question which is wide open under the Commission's Regulations and as to which the Commission's Regulations and Engineering Standards are either favorable to Respondent or are inconclusive, ambiguous and conflicting. The treatment of this subject is a matter which is pending before the Commission in a rule-making proceeding which was commenced in July, 1945 and which, after four years, is still pending and undecided.

In view of the publication of your letter, it is requested that you reexamine the opinion of the Court below in the light of the foregoing statements and determine for yourself the fairness of Respondent's statements and contentions as set forth herein. In fairness to the publication of

your statements, it is requested that you reconsider this matter and by letter to the Solicitor General set forth such conclusions and comments as may occur to you on restudy of this case.

Specifically, the question is this: In a matter acted on without a hearing, which, upon petition for reconsideration thereof, establishes that such action aggrieves and adversely affects the petitioner, would your agency, nevertheless, dispose of the case without any hearing; or, if at your election the allegations of the petition are considered true, would your agency dispose of the case on the questions of law involved but without any hearing by oral argument; or, if the allegations of the petitioner are not frivolous but raise a reasonable doubt as to the questions of fact or questions of law, would your agency dispose of the case by *ex parte* action without according the petitioner a hearing by oral argument on the validity of its claims?

Respectfully,

KIRKLAND, FLEMING, GREEN,  
MARTIN & ELLIS

LOUIS G. CALDWELL

April 18, 1949.



